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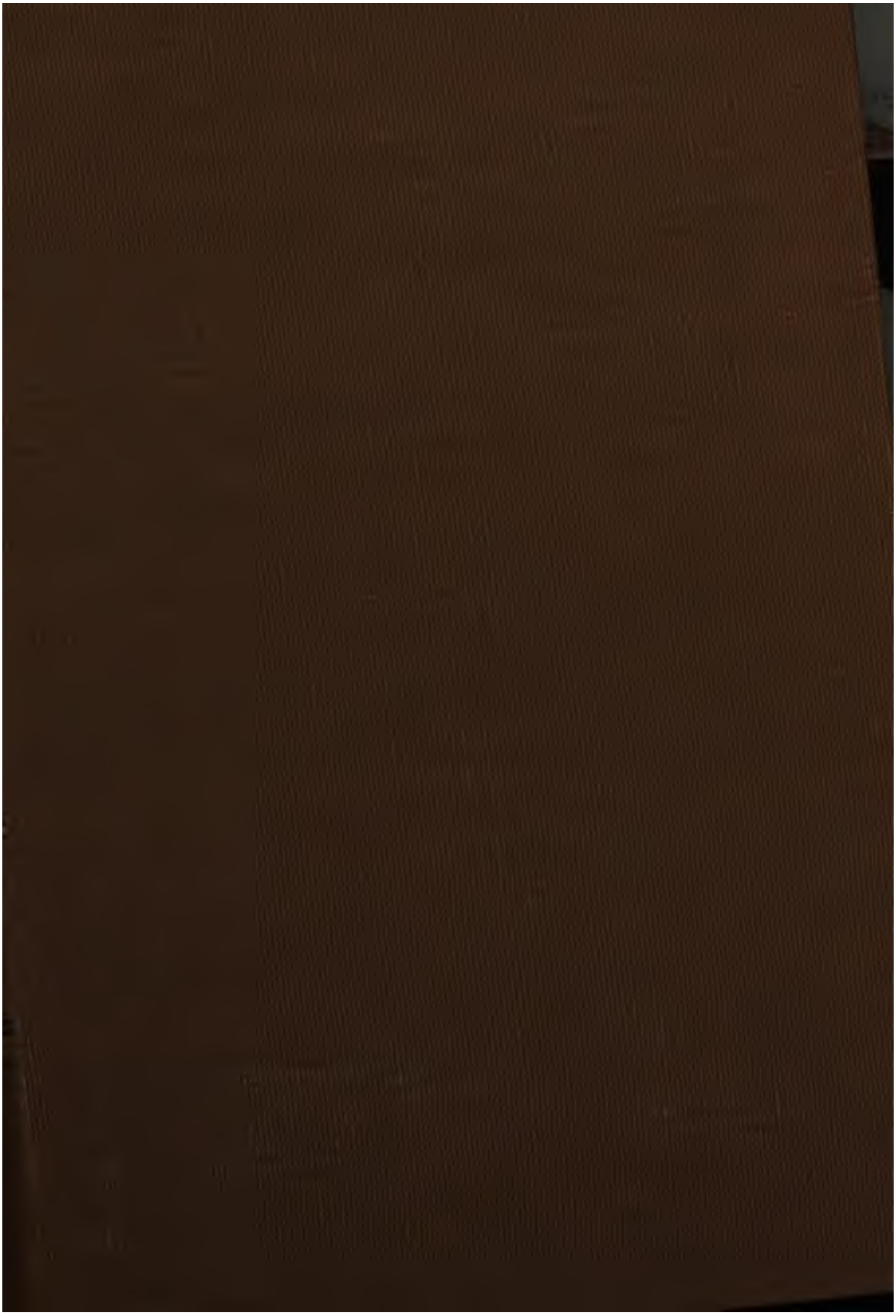

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NOVA SCOTIA.

REPORTED BY

BENJAMIN RUSSELL, M. A.,

AND

JOHN M. GELDERT, Jr., LL. B.

4 5 4 13

VOLUME I.

1879-80.

HALIFAX, N. S.
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ERRATA.

Page	13,	line	23—For "County Court" read "Chief Justice at Chambers."
"	16,	"	6—For "Defendant's" read "plaintiff's,"
"	59,	"	23—For "Kinnon" read "Donald."
"	79,	"	36—For "1868,' read "1878."
"	186,	"	32—After "child" read "or children."
"	219,	"	36—For "contention" read "condition."
"	246,	"	27 & 33—For "Ritchie, J." read "J. Ritchie."
"	250,	"	41—For "repeal" read "appeal."
"	341,	"	5—For "defendant" read "plaintiff."
"	353,	"	14—For "support" read "disproof."
"	432,	"	1—For "conviction" read "construction."

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CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1878, TO APRIL 1879.

(Continued from 3 R. & C.)

OUTRAM *v.* DOYLE.

PLAINTIFF brought action for the price of goods furnished to defendant, who professed, but without any valid authority, to be acting for the estate of a deceased person named Richards. Plaintiff and defendant were equally aware of the death of Richards, but yet the account was still kept in the name of Richards, who had in his lifetime had dealings of the same nature with the plaintiff.

Held, that if plaintiff could recover at all under the evidence, which was doubtful, he could only do so on a count for the breach of defendant's implied warranty of his authority to act for the estate.

THIS was an action for the price of two casks of ale furnished to defendant, who professed to be acting for the estate of a deceased person named Richards. The goods were charged by the plaintiff to Richards, and the account kept in his name. The cause was tried in the County Court before JOHNSTONE, J., who pronounced the following judgment :—

Where a person makes an oral or verbal contract, as agent for another, and at the same time names his principal, he is not personally bound thereby. The plaintiff knew that defendant was in the employ of Richards, and was in the habit of ordering ale. He kept the account in the name of Richards, although he knew he had died, and after that Doyle represented himself as agent for the estate of Richards. I can see no pretence for alleging that any credit was given to Doyle; and if Doyle had contracted without authority, the credit having been given to

the principal, it is doubtful whether he would be liable upon the contract as a party to it, but would rather be liable to a special action. *10 M. & W.*, 1–11.

Judgment for defendant.

From this decision the plaintiff appealed, and the argument of the appeal took place this term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and SMITH, JJ.

Russell, for appellant, contended that the general rule as to liability had been applied by the Court below to an exceptional case, and that the defendant, in acting as agent for the estate of a deceased person, had no responsible principal, the estate not being a person but a mere aggregate of rights and liabilities, and, therefore, that the defendant was personally bound by the purchase. *Story on Agency*, section 264 and note; *Polhill* v. *Walter*, 3 B. & Ad., 122, where the case of a purchase of goods in the name of a supposed principal was distinguished from an acceptance *supra protest* without authority; *Blades* v. *Free*, 9 B. & C., 167; *Kelner* v. *Baxter*, L. R., 2 C. P., 174.

Ritchie, Q. C., contra, contended that defendant had only contracted as agent and could not be made liable as principal, the plaintiff having himself regarded him throughout as only an agent, and having given the credit to the estate of Richards; and, further, that if liable at all, the defendant could only be made liable in a special action for breach of an implied warranty of his authority as agent. *Brice on Ultra Vires*, 784; *Smout* v. *Ilbery*, 10 M. & W., 1; *Jenkins* v. *Hutchinson*, 13 Q. B., 744.

Russell, in reply, referred to the dictum of Paley that a party contracting as agent was responsible as principal, (1) where there was no responsible principal to resort to, and, (2) where he exceeded his authority so that the principal was not bound. He admitted that the latter branch of the proposition had been modified by *Jenkins* v. *Hutchinson*, cited contra. The principle established by this case, that the party who signed an instrument for another, but without authority, could not be sued *ex contractu* as principal, had led to the invention of the doctrine of an implied warranty, which was only hinted at in *Lewis* v. *Nicholson* and finally adopted in *Collen* v. *Wright*,

8 El. & B., 645. These cases, however, he contended, left intact the principle that where an agent purchased goods in the name of another, having no authority and no responsible principal, he could himself be treated as the principal and sued on the purchase.

McDONALD, J., now, (February 15th, 1879,) delivered the judgment of the Court:—

This action was commenced in the County Court, in Halifax, on the common counts, to recover the price of two casks of ale; and it appears that one J. J. Richards kept a house called the Atlantic Hotel, in Halifax, and that, after his death, which occurred sometime before May, 1874, his widow, Mrs. Richards, carried on the business,—the defendant being her bar-keeper. At the time mentioned, (May, 1874,) the defendant spoke to the plaintiff about supplying five hogsheads of beer for Mrs. Richards, and he says that he purchased for her. The ale was sent to the hotel, one hogshead in June, one in July, one in August, and two in November, but Mrs. Richards died on the 15th of July, and all the ale was paid for except the two hogsheads delivered in November. The defendant says that he continued to carry on the business for the estate of Richards until March, 1875, under the authority, as he says, of one Hogan, who, however, does not himself appear by the evidence to have had any authority. The plaintiff says that he always kept the account in the name of Richards, although the latter was dead, and that he rendered a bill to Meagher after he heard he had something to do with the estate; and again that Doyle represented himself as the agent of the estate of Richards.

The learned Judge of the County Court who tried the cause decided in favour of the defendant, and this is an appeal from that decision. It is quite clear that the credit was not given to the defendant in the first instance, and we are now to enquire whether or not Doyle, if liable at all, can be held liable in this form of action as principal. It is important to bear in mind that the plaintiff himself says that Doyle represented himself as the agent of the estate of Richards, because, if the plaintiff did not previously know that Richards was dead, that necessarily gave him the information, and, therefore, he knew that fact as well as the defendant did. In fact, he does not

deny that he knew Richards was dead. Then the one had the same means as the other of knowing how far the price of the goods could be realized out of the estate; and the difference between this case and *Smout* v. *Ilbery*, 10 M. & W., 1, is that there both the plaintiff and defendant were at the time equally ignorant of the death of the person to whose name credit was given, while here the plaintiff and defendant were equally aware of Richards' death. There was no evidence of fraud, deceit, or misrepresentation in either case, and the form of action in both cases is substantially the same. Whether the agent is personally liable is a question of intention, and not an inference or conclusion drawn by the law; *Smith's Leading Cases*, 7th Am. Ed., 383; *Green* v. *Kopke*, 18 C. B., 549; *Heald* v. *Kenworthy*, 10 Ex., 739–741, except in the sense in which the law deduces intention from language and holds men to the legitimate result of their words and actions.

In the case referred to, *(Smout* v. *Ilbery,)* ALDERSON B., in his judgment, said; "In all the cases in which the agent has been held personally responsible, it will be found that he was guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act." ERLE, J., said; "I know of no case in which what is called a contract is made by the law contrary to the intent of the parties." CROMPTON, J., referring to *Jenkins* v. *Hutchinson*, 13 Q. B., 744, said; "Now, after that case and the present decision, it must be considered as decided law that the remedy against the person who professes to make such a contract, but has not authority, is either by an action for the deceit, alleging and proving the *scienter*, or, probably, on an implied contract that he had authority, but not by treating him as principal." *Brice on Ultra Vires*, 784, says; "The so-called agent is liable, not upon the contract as principal, where he exceeds his authority, but upon the implied warranty that he had a principal." He cites *Collen* v. *Wright*, 8 El. & B., 647, where defendant's testator, professing to act as agent for another, made an agreement with the plaintiff for the lease of a farm belonging to the alleged principal and signed his own

name to it as agent for the lessor. He had not, in fact, any authority from the alleged principal, and it was held in the Exchequer Chamber, on appeal, affirming the judgment of the Queen's Bench, that there was a contract on the part of the agent that he had authority, on which his representatives were liable. COCKBURN, C. J., dissented from this opinion.

In *Lewis* v. *Nicholson*, 18 Q. B., 512, WIGHTMAN, J., quotes from *Story on Agency*, section 264, who says that "whenever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal." But the learned Judge, (WIGHTMAN,) says, "that may well be admitted without its being an authority that he is liable *as principal* to fulfil the contract. I am strongly inclined to think that there is, in such cases, an implied undertaking by the agent that he has the authority to bind his principal which he assumed to have." Referring to another case cited, he said: "If BAYLEY, B., really meant, as he is understood to have done, that the man, though contracting as agent, was liable personally as principal, I must dissent from his doctrine. There is no case *in banc*, in our Court, in which such has been the decision."

The learned counsel for the plaintiff argued that the defendant ought to be held liable because he represented himself as agent for an estate, which, as he contends, cannot possibly be a principal at all. But if an estate cannot be a principal, that fact was as much within the knowledge of the plaintiff as of the defendant; and the plaintiff took the risk of supplying the goods, not upon the credit of the defendant, but of the estate, whatever it may have been worth. It was also contended that the defendant, having dealt with the property of Richards without showing any authority for doing so, is liable to the plaintiff as executor *de son tort*; but, independently of the question as to the sufficiency of the declaration to support such a case, there is no evidence whatever that the deceased, (Richards,) who appears to have been, in his life time, the proprietor of the estate, was ever indebted to the plaintiff at all.

It was argued on behalf of the defendant that the plaintiff, having kept his account in the name of the deceased, (Richards),

after his death, and having rendered it against the estate, made his election and cannot now look to the agent. That contention would have been entitled to much more weight if it were shown that there existed, in reality, within the knowledge of the plaintiff, somebody who could be called a responsible principal; *Thomson* v. *Davenport*, 9 B. & C., 78. But, as the case stands, although the keeping and rendering of the account in the way mentioned is strong evidence to show that credit was not given to the defendant at all, I do not think it is necessary, under the peculiar circumstances of the case before us, to say whether or not the plaintiff is precluded from recovering on the ground that he elected, at first, to look to the estate of Richards. I am decidedly of opinion that he cannot, under the evidence, succeed in this form of action; and it is not necessary to say whether or not he can recover in any other action, though I am inclined to think that under the same evidence he cannot do so.

EVANS ET AL. *v.* FOSTER.

PLAINTIFFS became insolvent after an appeal was taken by defendant to this Court from the judgment of the County Court, setting aside pleas. The Court granted an order preventing the cause from being proceeded with unless plaintiffs should give security or the assignee should intervene.

THIS was an action brought in the County Court, in which the pleas of the defendant were set aside by the learned Judge of the County Court as false, frivolous and vexatious. An appeal was taken to this Court from the order setting aside the pleas. After this appeal was taken the plaintiffs became insolvent, and a rule *nisi* was obtained on a previous day for security for costs.

Bligh, now, (February 1st, 1879,) moved to make the rule absolute, citing Insolvent Act of 1875, section 39.

Foster, Q. C., contra, contended that the Act simply prevented him from going on without giving security, but the assignee might intervene and then the cause could proceed.

The COURT.—We will grant an order that the cause be not further proceeded with unless the plaintiffs give security or the assignee intervene.

WOODILL *v.* LECRAS.

DEFENDANT'S appeal from the decision of the County Court in a cause tried July, 1877, was taken in the form of a rule for leave to appeal, unless cause to the contrary should be shown before this Court *in banc*. The rule also provided for a bond to be given.

Held, that the objection to the form of the appeal was fatal.

An order for appeal was afterwards granted by the County Court Judge, February 22nd, 1878, and the papers, certified March 7th, were filed March 11th, 1878.

Held, that this appeal must be dismissed, on the ground that it was perfected without any permissive order of this Court, when a very unreasonable time had elapsed after the verdict sought to be appealed from was given.*

THIS was an appeal from the decision of the County Court Judge for Cape Breton in favor of plaintiff, pronounced in July, 1877. The appeal was taken in the first place in the form of a rule, dated August, 1877, for leave to appeal, unless cause to the contrary should be shown before this Court *in banc*. The rule also provided for a bond to be given. The cause came on for argument February 19th, 1878, before SIR WILLIAM YOUNG, C.J., DESBARRES, MCDONALD and JAMES, JJ.

McDonald, Q. C., took a preliminary objection that there was no order for the appeal, but a rule *nisi* for an appeal returnable to this Court, which he contended was a fatal objection, and further that the rule was granted on grounds of law and fact, while the statute of 1877 gave an appeal only on points of law.

Weatherbe, Q. C., contra, contended that the statute gave an appeal without restrictions. Admitting that the rule in this case was not skilfully drawn up, he contended that the words, "unless cause to the contrary," &c., could be treated as surplusage.

The COURT.—We are all of the opinion that this rule cannot be argued under the statute.

---

*JAMES, J., delivering the judgment of the Court, held that, assuming the first rule to have been granted by the Judge, in his discretion, under section 25 of the Act of 1877, the granting of the second rule did not involve a second exercise of his discretion, but merely gave effect to his former decision. If, on the other hand, the first rule was taken under section 26, against the Judge's opinion, the act of granting it was purely ministerial. In either case, so far as respected the objection that the Judge was *functus officio*, the appeal should be sustained. He also held, without putting his decision expressly upon that ground, that the papers were not filed in time, as several days elapsed after the time allowed by the Judge for entering the cause, and after the cause was entered on the docket, before the papers were on file. It is difficult to determine whether these should be considered as rulings of the Court, or not, in view of the remark of SIR WILLIAM YOUNG, that the Court concur in the conclusion, but not necessarily in the reasoning of the Judge who pronounces the decision.

An order for appeal was afterwards made by the County Court Judge on the 22nd of February, 1878, and a rule *nisi* was taken out in this Court to set the order aside on the grounds, (1), that the Judge of the County Court was *functus officio* when he made the second order for appeal, (2), that the order for appeal was made too late, (3), that the papers in appeal were not on file certified by the Judge when the second order for appeal was made, (4), that the second order was granted on the faith of *ex parte* and incorrect statements, (5), that the second order was obtained under a misrepresentation of facts, (6), that the former appeal was still outstanding when the second order passed.

The cause came on for argument before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and JAMES, JJ., on the appellant's entry, but it was agreed between the counsel that the rule *nisi* to set aside the appeal should be argued at the same time.

Rigby, Q. C., for the motion to set aside the appeal.—The amending act of 1877, cap. 6, was in force when this appeal was taken. The first rule was granted in August, 1877. The Judge exercised his discretion in granting that rule, intending to grant a rule for an appeal. He did not refuse the rule, and it was not necessary that security should be given. The security provided for in the rule is independent of any statutory requirement. After once exercising his discretion the Judge could not do so a second time. He was *functus officio*. *Irving* v. *Askew*, L. R., 5 Q. B., 208.

This appeal is taken too late. The trial was in July, 1877, and the order now before the Court was not granted until February, 1878.

There is no evidence that the Judge ever extended the time. If the order could be granted in February, 1878, it could be as well granted in February, 1879. Section 16 of the act of 1877 gives the Judge power to file his judgment after the end of the sittings. That was not in the previous statute. If legislation was necessary to give that power, it was equally necessary to give power to grant an appeal out of the sittings, but no such power has been given. The first appeal was drawn up improperly and the appeal was dismissed.

They cannot after that take out another appeal. They could just as well after an appeal on certain grounds had been dismissed take out a fresh rule for appeal on different grounds and ask to have it argued. The former order was outstanding. It had been disposed of by the Court, but no order dismissing it had been taken out.

The papers were not on file. Papers on the first appeal are not papers on the second. When the first appeal was was dismissed those papers went for nothing. See section 29 of the act of 1877.

The Court has decided that no papers from the County Court can be read unless certified to this Court. *(Graham.*—The papers are all certified.) They were not on file when the entry was made. The order for appeal is 22nd February, 1878, and the papers certified March 7th and filed March 11th.

Graham, contra.—The English case cited does not apply. It was simply held that a Judge could not change his judgment. This case differs from that in that the Judge did not in the first instance refuse a rule. He granted the rule. The rule is on motion of counsel. That is not a rule under the statute. (YOUNG, C. J.—There would be no security if he had granted the rule.) I think he was acting under the previous statute. Under the old statute security would be required. He afterwards granted a rule without security. That showed his intention. The first rule failed because it was an order *nisi*. If this were a rule under the statute it would be by the Court. Here it is by the Judge. The statute does not limit any time, and we are entitled to reasonable time. We have not been guilty of any undue delay or laches after the quashing of our first rule.

Cites *2 Pugsley*, 466, where the papers were not certified, and the Court sent them back to be certified, after which the cause came on. *(Rigby, Q. C.*—That has been overruled by this Court.)

JAMES, J., now, (February 1st, 1879,) delivered the judgment of the Court:—

This case came before us on appeal from a decision of the Judge of the County Court in favor of the plaintiff, at Sydney, C. B. A preliminary objection was taken that the appeal was

informal, and upon that, the Court being of opinion, after hearing counsel for appellant, that it was fatal, the appeal was dismissed. The appellant's counsel then suggested to the Court that a new appeal might be taken, and to this suggestion the Court replied that they would express no opinion. The application for a second appeal has never been sanctioned nor endorsed in any way by the Court. I mention this, inasmuch as one of the counsel for appellant not present at the time, as appears by his affidavit, was under a misapprehension upon that point.

The cause was tried in July term, 1877, and judgment given in the same month. The first appeal was granted in August of that year, and set aside on 19th February last. A second appeal was taken from the same judgment, and entered for argument on the docket for this term. A rule *nisi* having been granted at the close of last term to set aside this second appeal was entered on the docket and argued at the commencement of this term.

The first ground was that the Judge was *functus officio* when said second order for appeal was granted, his statutable power having been exhausted by the exercise of his discretion in granting the first appeal; and the case principally relied on is reported in *5 L. R. Q. B.*, 206, in which it was laid down by HANNAN, J., that the powers of the County Court Judges, being statutable, could not be enlarged beyond the terms of the act; and that when the Judge had formally given a judgment he could not afterwards alter his decision. In that case he had refused a new trial and it was held that he could not afterwards grant it, although convinced he had been mistaken. The applicability of this case depends on whether the appeal was granted in the exercise of the Judge's discretion under section 25 of the act, (1877) or taken against his opinion under section 26. If under section 25, the Judge has exercised his discretion, and having done so, I consider that his granting a second order did not involve the exercise a second time of his discretion, but merely gave effect to his former decision, by replacing the informal appeal by one in due form. And if the rule was taken under section 26, the act of the Judge in granting the appeal was purely ministerial and did not involve the

exercise of his discretion at all, and therefore the case cited does not apply.

It is true the Judge in granting the appeal under section section 26 exercises a discretion in directing the amount of the bond, but that was done on the first appeal, and did not, in my opinion, require to be altered or renewed. It has been suggested to me, although not discussed at the argument, whether the bond filed at the first appeal would be valid for the second, but in fact there has in my opinion been but one appeal, and I see no reason why the bond should not be valid. I infer from the fact that the Judge required a bond, that the appeal was taken under section 26, although the attorney of appellant in his affidavit states that the Judge was willing to grant the rule. But it is clear that he was not willing to do so without the bond. In either case I think the appeal should be sustained on this ground.

The 6th objection, that the former appeal was still outstanding when the second order passed, I consider of no avail, inasmuch as the carrying of the rule was on the appellee, and if he did not choose to exercise his right to issue his rule on hearing the decision of the Court in his favor, he could not by his delay deprive his opponent of a right to which he was legally entitled.

The second objection, that the second appeal was taken too late, is very material, because there is no time fixed by the statute for taking the appeal, and it is very important that this Court should, as soon as such a defect in the act is suggested, express an opinion which may at least to some extent guide the County Court Judges in future cases, until a legislative rule shall be provided.

In this case the verdict was given in July, and the appeal was not perfected until the February following, eight months afterwards. That it was not perfected sooner was owing to no laches of the plaintiff; and if the defendant by his own laches lost the time during which he ought to have perfected his appeal he has no right on that account to delay the plaintiff from reaping the fruit of the verdict in his favor. The only question is whether eight months is such a time as in the absence of a legislative rule we ought to hold unreasonable,—and in view of the periods allowed in appeals from this Court

to the Privy Council, or to the Dominion Supreme Court, or the time allowed in this Court for moving to set aside a verdict, or for an appeal from a Judge at Chambers, or from a Justice's court to the County Court, I cannot hold that eight months is reasonable time to allow the defeated party to appeal from a decision of the County Court. I must therefore, hold that the appeal in this case was too late, and must be set aside.

The objection that the papers on appeal were not filed in time, I am disposed to think sufficient, inasmuch as several days elapsed after the time allowed by the Judge for entering the cause and after the cause was entered on the docket, before the papers were on file. But it is unnecessary to give an express decision on this point, and I only mention it as a caution to practitioners.

It is unnecessary for me to decide as to the effect of an alleged misrepresentation of what had passed in this Court, in inducing the Judge to grant the second appeal, inasmuch as the appeal cannot be sustained on other grounds.

It only remains to notice the appellant's contention that the motion to set aside the appeal should have been made to the Judge of the inferior court. Whether the cases go the length of showing that a Judge of a Court acting under a statute can rescind his own orders granted by mistake, or obtained by fraud or misstatement, I need not now decide. But it appears to me there can be no doubt that a superior court, in the exercise of its inherent general power of reviewing the decisions of inferior courts, can rescind or set aside any proceeding of an inferior court under its jurisdiction. If the power in any such case exists in the inferior court—as is contended to be the result of the cases in this instance—then the jurisdiction will be concurrent. If not, it is exclusively in this Court.

I think the appeal should be dismissed on the ground that it was perfected without any permissive order from this Court, when a very unreasonable time had elapsed after the verdict sought to be appealed from was given. Appeal discharged with costs.

WHEELOCK *v.* BROWN.

APPEAL from County Court, (under Act of 1877, chap. 6,) dismissed, the cause not being entered on the docket, and no certified papers being on file.

Rigby, Q. C., on one of the motion days of this Term moved to dismiss the appeal from the County Court in this cause on the grounds that the cause had not been entered on the docket, and that the papers were not on file.

Harrington, contra, cited chapter 6 of the Acts of 1877, section 28, to show that the motion should have been made before the Judge of the County Court.

Rigby, Q. C., replied that the section cited only permitted the appellant to move the Judge below, but did not take away the right to move this Court; further, that one of the grounds taken in the rule was that no certified papers were on file.

SIR WILLIAM YOUNG, C. J., now, (February 15th, 1879,) delivered the judgment of the Court, dismissing the appeal.

BROWN ET AL. *v.* HARRIS.

PLAINTIFFS wrote to Defendant August 15th, demanding payment of an account admitted to be due. Defendant replied, forwarding a promissory note for the amount with interest and bank discount. Plaintiffs handed the reply, with the promissory note to their attorneys, who wrote, August 27th, for a settlement, but did not return the note, which had not matured when plaintiffs brought action for the amount of the account.

Held, on appeal from the judgment of the County Court, setting aside a plea founded upon the acceptance of the note, that there had been no acceptance of the note in payment of the account.

THIS was an action on the common counts for goods; defence that the plaintiffs had accepted a note in payment which was still outstanding. Plaintiffs obtained a rule *nisi* to set aside the pleas as false, frivolous and vexatious, on affidavits showing that the goods had been purchased for cash in April, 1877; that plaintiffs had written to defendant August 15th, 1878, demanding payment of the account, and intimating that unless paid in ten days it would be handed for collection, to which defendant had replied by forwarding a promissory note for the amount, upon receipt of which plaintiffs sent the account,

with the note, to their attorneys. Plaintiffs alleged that they had not accepted the note in payment, that they had always been willing to return it when called upon to do so, and they annexed the note to their affidavits to be dealt with as the Court should direct. Defendant's affidavit in reply set out that the goods had not been bought for cash, but on the usual terms, that on receipt of plaintiffs' letter of August 15th, asking for a settlement, he had replied, enclosing a promissory note to the plaintiffs or order, to cover the amount with interest and bank discount, dated August 24th, 1878; that afterwards he received a letter from plaintiffs' attorneys, in which no reference was made to the note, and no intimation that it would not be accepted; that if the plaintiffs had at any time previous to September 30th, 1878, when the pleas were pleaded, returned the note or intimated that they could not accept it, he would have immediately remitted the cash and paid the same; that the note was not yet due and would not be due till November 24th, 1878.

The letter of plaintiffs' attorneys referred to in defendant's affidavit was as follows:—

HALIFAX, *August 27th, 1878.*

MESSRS. HARRIS & Co.,
Bridgetown, N. S.

Gentlemen,—Messrs. Brown & Webb have handed to us your account with them in order that we may obtain a settlement. They say that they wrote you a few days ago in reference to this matter, indicating what they intended doing. We need not repeat their letter.

Yours truly,
MEAGHER & CHISHOLM.

Upon these affidavits the rule was made absolute by SIR WILLIAM YOUNG, C. J., to set aside the pleas, and from this decision the defendant appealed. The appeal was argued before DESBARES, MCDONALD, SMITH and JAMES, JJ.

Foster, Q. C., for appellant.—The whole question here is whether the note was accepted. The learned Chief Justice said he had doubts, and had not found a case that exactly satisfied him. It is a question of law whether the plaintiffs,

having received the note and not returned it, must be held to have accepted it. (DESBARRES, J.—The day after receiving it they ordered their attorneys to collect the debt, and that showed their intention.) The defendant had good reason to suppose his note was satisfactory. He had been dealing with them in the same course. His inference was that the account had been placed in their hands previous to the note being sent, and without knowledge of it. He would not, therefore, naturally suppose that the letter from Meagher & Chisholm was a repudiation of the note. (MCDONALD, J.—It is singular that he did not reply to Meagher & Chisholm.) Receiving and accepting are pretty much the same thing. There is no distinction drawn in the books. *Steadman* v. *Goosh*, 1 Esp., 3; *1 Bing*, 311; *2 Cr. & J.*, 409; *3 M. & S.*, 66. This is not the proper way to try the question. There should be a trial in the ordinary way. (MCDONALD, J.—There is no contradiction in the affidavits.)

The Court does not attach sufficient importance to the fact that the defendant's negotiable note was in the hands of the plaintiff, and he had a right to assume that it had been dealt with as indicated in his letter.

Meagher, contra.—The cases cited are none of them applicable to this case.

THE COURT.—We have heard all that could be said for the defendant in this cause, but the authorities produced in favor of his contention have not satisfied us that there was anything like an acceptance of the note in payment of this debt. The appeal must, therefore, be dismissed.

HEAD *v.* PUTNAM.

DEFENDANT broke and entered plaintiff's premises, not being within a mile of any mine or mining works, and seized and destroyed intoxicating liquors found thereon. Plaintiff brought an action of trespass, and defendant justified under a warrant commanding him to seize all the liquors found or to be found by him on the premises. Verdict for defendant set aside.

THIS was an action of trespass for breaking and entering defendant's premises. Defendant justified under the following warrant:—

PROVINCE OF NOVA SCOTIA, }
County of Queens. }

To all or any of the constables and other peace officers of the County of Queens:

Whereas it hath this day been charged upon oath before me, the undersigned, one of Her Majesty's Justices for the said County of Queens, and Stipendiary Justice for Liverpool Police District, that Philip Head, of Polling District No. 2, in said County of Queens, hath been heretofore twice convicted of violating the provisions of chapter 75 of the Revised Statutes, "Of Licenses for the sale of Intoxicating Liquors," and that there have been, and are now, on the premises of the said Philip Head, in said Polling District, intoxicating liquors, which are meant or intended for illicit sale, contrary to the provisions of said statutes.

These are therefore to command you forthwith to seize all the intoxicating liquors found and to be found by you upon the premises of said Philip Head, in said Polling District, and forthwith to destroy the same.

Herein fail not.

Given under my hand and seal at Liverpool, in Queen's County, this 7th day of January, A. D. 1878.

(Sgd.) JASON M. MACK,
Stipendiary Magistrate.

Under this warrant the defendant entered upon the premises of the plaintiff, broke the door, and seized and destroyed a quantity of intoxicating liquors there found. The jury found a verdict for the defendant, and a rule was taken to set the verdict aside, which now, (February 24th, 1879,) came on for argument.

McCoy, Q. C., for rule.—The proceedings here were taken under the act of 1874, cap. 14. There is nothing in that act to authorize the issue of a warrant under which the constable can break and enter to destroy liquor. The only power given in the statute to break and enter is in the case of liquor exposed for sale in mining districts. Further, there is nothing in the warrant to authorize the constable to break and enter.

Parsons, contra, (with whom was *Meagher*,) referred to the statute and the papers.

Plaintiff's counsel were not called upon to reply.

The COURT made absolute the rule to set aside the verdict.

VON METZKE *v.* PADFIELD.

PLAINTIFF, having been engaged as teacher of languages for defendant, at a salary of $700 a year, entered, verbally, in February, 1877, into a new arrangement for $500, with the privilege of taking private pupils. Afterwards, in August, 1877, he wrote defendant that he wished to revert to the former arrangement, to which defendant made no written reply, and there was conflicting evidence as to whether defendant ever verbally agreed to return to the old arrrangement. The Judge of the County Court gave judgment for the plaintiff, on the basis of $700 *per annum* for the quarter from November, 1877 to February, 1878. An appeal was taken from this decision, and the Judge reported that it had been granted under section 26 of the County Courts Amending Act of 1877.

Held, that the Judge, being called upon to exercise the powers of a jury, had the right to decide the question of fact as he did, giving due weight to the letter of plaintiff, and to the defendant's omission to reply to it, and that the appeal must be dismissed.

THIS was an appeal from the decision of SAVARY, J., of the County Court, sitting at Yarmouth, and was argued this Term before DESBARRES, MCDONALD, SMITH and WEATHERBE, J J.

The plaintiff, having been engaged as a teacher of languages for defendant, at a salary of $700 a year, entered verbally, in February, 1877, into a new arrangement, by which he was to receive $500 and have the privilege of taking private pupils. Afterwards, in August, 1877, plaintiff wrote to defendant that he wished to revert to the old arrangement, with a modification as to time of payments. No written reply was made by defendant to this letter, and there was conflicting evidence as to whether defendant ever verbally agreed to return to the $700 arrangement. Judgment was given for plaintiff for the quarter from November, 1877, to February, 1878, at the rate

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of $700 a year, and for the quarter from August, 1877, to November, 1877, at the rate of $500, from which defendant appealed.

Meagher, for appellant.—The services began November, 1875. Plaintiff was paid to February, 1877. Then the new arrangement was entered into, changing the salary from $700 to $500, which continued to the end. That is my contention The Judge has found this was a yearly hiring. Therefore it was a yearly engagement from February, 1877, to February, 1878. Plaintiff contends it was a temporary arrangement, but there is no support for that. The letter bears on its face evidence that the party was not claiming as a right the return to the old arrangement. He further wishes to add to that original arrangement by making the payments quarterly. Up to October defendant was silent, as the Judge admits. Then he spoke at the end of the quarter in October and repudiated plaintiff's claim. Yet the Judge allows the defendant the benefit of his contention for the *time he was silent* and gives it against him after he repudiates the plaintiff's claim, and that although the Judge holds defendant responsible only on the ground of silence. The moment that bargain was made for $500 it was made for a year, to February, 1878, and could not be disturbed by the fact of the letter in August, 1877. To make that letter a new bargain something more than silence was required on the part of the defendant. To bind defendant to the new contract, claimed by plaintiff and assumed by the Judge,—that is, a yearly hiring from November, 1877,—a writing under the Statute of Frauds would be required. The plaintiff went on with the same school hours as under the $500, *i. e.*, from 9 to 1, which were different from those under the old $700 arrangement. Cites *4 DeG., J. & S.*, 642.

Harrington, contra.—The original contract for $700 was not yearly, as there was a stipulation that it could be revoked by a three months' notice. After the letter defendant states that he stayed and was ready to teach in the afternoon, but there were no scholars. On November 4th the plaintiff sent his account. November 9th he wrote again, asking as to his account, and tendering his resignation, to which defendant replied, accepting the resignation, and as to the account, saying that it had only been due four days,—not repudiating it at all.

On the 21st of November he paid $105. Nothing saves that payment from being an absolute admission of the full indebtedness, except an alleged verbal repudiation in the interim, which is denied. The Statute of Frauds applies only to cases where the contract cannot be performed within the year. Besides, in this case it is an executed contract. (*Meagher.*—The execution was under the $500 contract.) If the Statute of Frauds is to be invoked, the plaintiff is liable on the original agreement for $700 all the way through. The original contract could not be altered by the parol agreement for $500. Cites *14 Q. B.*, 664; *Taylor on Evidence*, 712.

Meagher, in reply.—The burden of proving that the old arrangement was revived rests on plaintiff. Cites *1 C. M. & R.*, 692; *4 H. & N.*, 78.

McDONALD, J., now, (March 1st, 1879,) delivered the judgment of the Court:—

This is an appeal from a decision of the County Court Judge, at Yarmouth, and the question is one of fact. The plaintiff was employed by the defendant as a teacher of languages and instrumental music in a school at that place, at $700 a year, and for some time served in that capacity under that agreement, but it was afterwards verbally agreed that he should take $500 a year instead of $700, with the privilege of giving private lessons and receiving pay therefor from the pupils. The plaintiff says: "This was only to be a trial, and it was a strict understanding to go back to the old agreement if I found myself a loser by it." The defendant, in his evidence, denies that the plaintiff had any such option; and, after teaching for some time under the new arrangement, the plaintiff, in August, 1877, mailed to the defendant's address a letter, which the latter received, proposing to return to the old agreement. It concludes thus: "You will understand, dear Sir, that, as I mentioned before, the duty toward my family compels me to mention such facts, and, having demanded nothing unjustly, I hope you will not misunderstand me, and if objections from your part should exist communicate such." The letter, although long, does not, in express terms, insist upon going back to the first agreement as a matter of right, and the sentence just

quoted is the strongest evidence which it contains in favor of the plaintiff in view of what followed.

After this date the plaintiff continued to teach for nearly two quarters, but the defendant did not communicate to him any objections to the proposal,—in fact, did not reply at all, and the learned Judge of the County Court, being, in that Court, the sole Judge of the evidence as well as of the law affecting the case, regarded that letter and the omission of the defendant to reply to it as sufficient to justify him in deciding in favor of the plaintiff for the difference of wages at the rates mentioned ($52.70) during one quarter. From this decision the defendant appealed to this Court.

Objection was taken at the argument that, under chapter 6 of the Act of 1877, sections 25 and 26, which enumerate cases in which appeals may be taken, but do not mention questions of fact, no appeal lies in this case; and that view of the law seemed, during the last term of this Court, to have been accepted as the correct one. But it is now contended that sections 51 and 53 of the Act of 1874, establishing County Courts, and which gave an appeal in all cases between $40 and $80, on giving security, etc., not having been repealed in express terms, are not repealed at all by the general repealing clause (section 34) of the Act of 1877, because, as it is contended, there is no inconsistency between the two acts, so far as they relate to appeals. But the learned Judge of the County Court reports that he granted this appeal "under section 26 of the County Courts Amending Act of 1877." And if, as I am inclined to think, the appeal is not properly here to justify us in reviewing the decision of the learned Judge of the County Court upon the facts of the case solely, of which facts he was unquestionably the Judge in his own Court, it is impossible for the defendant to succeed. But it is not necessary to decide this case on that ground, because, assuming that we are at liberty to review the decision of the Judge upon the facts, I think that he, being called upon at the trial to exercise the powers of a jury as well as those of a Judge, had the right, if he thought fit, to decide the question of fact as he did, giving due weight to the letter in question, and to the defendant's omission to reply to it. I regard his finding, in that respect, in the same way, and entitled to as much weight as I would that of a jury, and if the cause

had been tried by a jury I think it would have been the duty of the presiding Judge to direct their attention to the letter referred to, and to the fact that the defendant did not reply to it, after having been asked to do so if he objected, in order that they might, if they thought fit, regard it as evidence to turn the scale when the plaintiff and defendant were directly at variance as to the parol agreement.

I am of opinion that the appeal must be dismissed.

McLEOD ET AL. *v.* CITIZENS' INSURANCE COMPANY.

PLAINTIFFS, in their statement of loss by fire claimed that a building constituting part of the property destroyed was worth $2000. The evidence as to the real value of the building was such as to convince the Court that it was not worth when new more than $800 to $1000, and that at the time of the fire it was not worth more than $500.

Held, that the verdict, which was the second verdict in favor of the plaintiffs, must be set aside on the ground of fraudulent overcharge in the claim of loss,—the policy providing that the insured should forfeit all remedies if guilty of "any wilful mis-statemen. with intent to deceive the Company as to the amount of the loss."

THIS was an action on a policy of insurance against fire. The cause was tried at Lunenburg before Mr. Justice McDONALD in October, 1877, and a verdict found for plaintiff for $3000. That verdict was set aside after argument, *(3 R. & C.*, 156,) and the cause was re-tried before Mr. Justice RITCHIE, E. J., in October, 1878, when a verdict was found for plaintiff for $2000. A rule *nisi* was granted to set this verdict aside and argued January 25th, 1879, before SIR WILLIAM YOUNG, C. J., and DESBARRES, McDONALD and WEATHERBE, J J. The grounds on which it was sought to set the verdict aside were fraudulent over-valuation of the loss in the claim after the fire, and excessive damages.

Henry, in support of rule.—The 11th condition on the back of the policy here, which is made a part of the contract of insurance, is as follows:—"If in any claim for loss or damage, or in the affidavit or affirmation made in support thereof, the assured is guilty of any wilful mis-statement, with intent to deceive the Company as to the nature of the risk, or as to the amount of the loss; or if there be any fraudulent overcharge in the claim made, this policy shall cease to have any effect

and be void, and the insured shall forfeit all remedies and rights of action thereon." The 2nd condition is, in part, as follows:—" * * * If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, * * * it must be so represented to the Company, and so expressed in the written part of this policy, and otherwise the policy shall be void." The discrepancy between the valuation here, $4500, and the verdict, $2000, is enough to establish fraud. See the judgment of the Court in setting aside the first verdict in this case, *3 R. & C.*, 156; also the several cases cited in that judgment. In the case of *Cann* v. *Imperial Insurance Company, 1 R. & C.*, 240, the loss claimed was $1600, the insurance $1400, and the verdict $840, and the jury found that the plaintiff had made an over-valuation through ignorance, not fraudulently. See also *4 Bennett's Insurance Digest*, 648, to shew that a second verdict like this has been set aside. It cannot be contended here that these three plaintiffs all of whom swear to the proof of loss, were mistaken through ignorance or simplicity.

As to the other point, that the assured had not the sole ownership in the property, there being a bill of sale upon it and an outstanding interest in a fourth party, and that the policy was void under condition 2, the evidence on the second trial was somewhat different as to the bill of sale, but it did not do away with the outstanding interest in Starratt, who was not one of the insurers. Cites *5 Bennett*, 377. Starratt had an equitable interest not disclosed and not mentioned in the policy.

Rigby, Q. C., contra.—On the former trial it appeared that there was an outstanding bill of sale; on the latter trial it appeared that the bill of sale was paid off, though not formally released. As to Starratt's interest, he had been a partner of McLeod, and his interest in the real estate on which the building stood was, in equity, personal property. *Lindley on Partnership*, 685. The firm of which he was a member was dissolved by his absconding; it is in proof that the property in which he had an interest was insufficient to pay the debts of the firm. The surviving partner, (McLeod,) took in two others, who formed a new firm, and assumed the debts of the old, and consequently took all the interest in the real estate. Two of

the plaintiffs here held the legal estate, having a mortgage over the real estate. The object of the condition here is not to include nice questions of title. Cites *18 U. C., C. P.*, 74.

As to the question of fraud, this case stands in even a better position than that of *Cann* v. *Imperial Fire Insurance Co.*, as the Judge not only asked the jury to find on the question of fraud, but intimated to them that if he had the finding of the verdict he would be inclined to find that there had been fraud on the part of defendants. We admit that there was overvaluation, but what evidence is there of fraudulent overvaluation? Witnesses, in estimating the value, swore to estimates ranging all the way from $400 to $2800. The moment the Court here undertakes to say this was a case of fraud it is virtually going into the jury box. This Court can never settle that this is a fraud; all it can do is to send it back to a jury. In the case of *Levy* v. *Baillie*, the Court merely, after the first verdict, said, "this looks like fraud, there is such a discrepancy between the valuation and the verdict, and we will give you a new trial, if you will pay the costs." Cites *7 U. C. C. P.*, 548; *2 Bing., N. C.*, 892; *3 Taunt.*, 332; *7 U. C. Q. B.*, 75; *34 Id.*, 384; *27 Id.*, 473, to shew that the Court will not send a question of fraud back to a jury a third time.

Henry, in reply.—With regard to the ownership here, the condition of the policy requires a sole, absolute and unconditional ownership. That must exclude any reasonable claim to the property on the part of any third party. Starratt's interest in this property was such as he could have insured, and for the loss of which he could have recovered. The words, "for the benefit of the assured," may be left out for the purpose of this argument. As to the contention that Starratt's interest in the partnership property was swallowed up by McLeod and the new partners, their assuming of the old firm's debts did not relieve Starratt. It is a nice question whether, if the plaintiff succeeds in this action, Starratt would not have an interest in the proceeds of this policy.

With regard to the power of the Court to order a third trial, the Court has the same discretionary power to order a third or a fourth trial as a second. The case of *Rice* v. *Imperial Ins. Co.*, cited from 8 U. C., was tried before DRAPER, C. J., who said merely that he was not satisfied that the property was as

valuable as represented, and further that he did not feel able to say that the jury had been clearly wrong in saying there was no fraud. The case cited from *3 Bingham* was also one where there was a doubt on the part of the Court. None of the cases cited on this point come up to this, where the verdict is clearly unsatisfactory.

As to the evidence of fraud here, the authority of *Levy* v. *Baillie* is cited with approval in all the subsequent cases; it is cited with approval in all the American cases. One of the plaintiffs, who had valued the building at $3000 in insuring it, swore that when destroyed it was worth $1500. He did not even say that he was mistaken in the expectations formed of the business when he valued it at $3000.

WEATHERBE, J., now, (March 1st, 1879,) delivered the judgment of the Court:—

In this action on a policy of insurance against fire, on the former trial the plaintiffs obtained a verdict for $3000. The verdict was set aside, and on a new trial in October last, before the learned Judge in Equity, a verdict was found for plaintiffs for $2000, which we are asked to set aside on the ground of over-valuation and fraudulent overcharge in the claim, and because plaintiffs had not the unconditional ownership of the property, and because the sum found is excessive and against the weight of testimony.

Insurance had, in this case, been effected for $2000 on a shingle mill, and $1000 on machinery, $3000 in all; and before the fire, as well as afterwards, the plaintiffs had represented the property to be of the value of $4500. The whole question as to value arose as to the mill, it having been conceded that the machinery was correctly valued at $1000. One of the plaintiffs testified that the defendant's agent inspected the property and named the sum at which it should be valued.

The evidence is tersely abridged in the charge of the learned Judge who tried the cause. He says:—"For the loss of the building $2000 was claimed. This I thought was so much more than it appeared from the evidence to be worth, as to lead to the inference of a *fraudulent overcharge on the part of the plaintiffs*. The mill site, dam, water wheel, &c., together with the building, had not long before been purchased for $800, and,

though some repairs had been put upon it, these, according to their own witness, Nicholls, who superintended the work, were made *at a cost of $100.* Some of the plaintiffs' witnesses, indeed, had valued the building at $1500, and *one at $2000,* but they spoke of the value of the building when new, and it was unquestionably of much less value when destroyed. All of the witnesses speak of its being to a certain extent in a dilapidated condition as regards the roof and the windows. It is true Greenwood, one of the plaintiffs, says that the cash valuation of the whole property was over $3000, about $3800; that of the building, $2400. And McLeod, another plaintiff, says, 'when destroyed it was worth $1500, the whole property was worth $4000,' thus estimating the machinery at $1500, while Greenwood only valued it at $1400, and in their claim for loss they concurred in stating the whole value of the property lost to be $4500. But as such valuations as these are repudiated by all the witnesses, as well those on the part of the plaintiffs as of the defendants, they, so far from supporting the case of the plaintiffs, lead to an *unfavorable inference against them.* I called the attention of the jury to the statement rendered by the plaintiffs to the defendants of the cost of the property insured, shewing it to have been $3917.06, and pointed out the character of several of the items, the incorrectness of which was shown by the evidence, and particularly referred to the charges made for services performed by the plaintiffs themselves. These services were such as were usually performed *by ordinary day laborers,* and they admit the services could have been performed *for $1 a day or thereabouts.* McLeod is called foreman, and the charge for him *is $3.25 a day; the charge for the other two is $2.25 each.* What these men did was work of the commonest kind. McLeod says he did what came to hand, rolled away stones, dug and tore away old work, and Greenwood did not do as much as he did. I remarked upon the *unsatisfactory explanation that was given of the several items.* I then called the attention of the jury to the evidence on the part of the defendants, the effect of which would lead to the inference that the cost of the building when new would be $800; that, being old and out of repair at the time of the fire, it was worth from $300 to $600; and out of the large number of witness produced but one estimated it at the larger

sum. On a review of the whole case I told them that the impression left on my mind was that the building, when destroyed, was not of greater value than $500, and that of the machinery $1000; and I could not see how the plaintiffs could have been ignorant of the true value and have over-estimated it as they did in their claim on the defendants, without its leading to the inference that they had been guilty of a mis-statement made with intent to deceive the defendants as to the extent of the loss they had sustained. I told them, however, that the question was one entirely for them to decide, and if they thought otherwise they would find a verdict for plaintiffs for $1000 for the loss of the machinery, and such further sum as they considered to be the value of the building at the time of the fire."

A very exaggerated overvaluation, or overvaluation through mistake, where there is no fraud, will not prevent the plaintiffs from recovering the amount of actual loss, and because we are not satisfied that the property is as valuable as was represented, that itself is not sufficient to justify us in setting aside the verdict. But considering the very marked and striking inconsistency between the plaintiffs' representations and the real facts of the case as to the value of the building, and considering the very great weight of evidence on the part of defendant we are unable to see how it is possible this verdict can stand. The rule for a new trial must, for this reason, be made absolute with costs.

SIR WILLIAM YOUNG, C. J.—This is the first case, so far as my recollection extends, in which a third trial has been ordered where there have been concurring verdicts for the plaintiffs, and the question turns upon the weight of evidence, two of the plaintiffs having been examined in their own vindication on allegations of fraud. It is well, then, to look into the grounds on which so unusual a course has been adopted. There is no question of the right of the Court to grant a third trial, (*Archbold*, 1534,) but in none of the cases cited by him and at the argument, was such a trial in point of fact ordered, and I have found but one instance in the English reports, that of *Davies* v. *Roper*, 33 L. & E., 511, in 1856, where an instructive note is added by the reporter, reviewing the previous cases.

It is familiar law that the Court will not uphold verdicts rendered in the teeth of the law, as for example on a question of title, of which the Rodney trials in our own Province are a memorable example. But where two verdicts have been founded on conflicting evidence a different principle applies, and a clear case should be made out. In *Hilliard on New Trials*, 477 to 479, numerous instances are given from the American Courts, in some of which a third trial was refused, and in one a third verdict was set aside, being wholly unsupported by the evidence, and a new trial was ordered. In *Foster* v. *Steele*, 3 Bing., N.C. 892, the Court were equally divided on the propriety of setting aside a second verdict on a question of insurance. TINDAL, C. J., and PARK, J., thought that if a third verdict were given for the plaintiff, the same reasons might be urged as before for granting a fourth trial, and so suspending the functions of the jury or leading to endless litigation. VAUGHAN and COLEMAN, JJ., desired to try the result of a third trial, but if a third verdict were given against the defendant, then the proceedings should end.

Now, we cannot anticipate the effect of a third trial here if had. But we concur in thinking that the plaintiffs are not entitled to judgment on the verdict now before us. The second jury have awarded them $1000 less than the first, on evidence substantially the same, but the fraudulent representation as to value is so clearly shown and so patent, that we think we ought not to sanction it. I pass by the estimate on which the policy was issued, to which the agent of the defendant forgetful of his duty, was a party. It is the defence under the eleventh condition of the policy, "the wilful mis-statement with intent to deceive," that at the present moment I chiefly look to. The three plaintiffs combined in a claim under oath stating that the whole value of the building, that is the mill, and machinery therein, was $4500 or upwards, on which $3000 was insured, $2000 on the mill and $1000 on the machinery, which was not over-valued. The second jury found a verdict for $2000, of which we must assume one-half to go for the machinery, leaving $1000 for the mill, that is, one-third of what the plaintiffs swore it was worth, and one-half of what they insured on it. This of itself is an index of fraud under the

decision in *Levy* v. *Baillie*, 7 Bing., 349. But, notwithstanding an amount of evidence for the plaintiffs which cannot be read without surprise, the evidence on the defence is so strong and so consistent that it produced a significant intimation from the Judge on the trial, and has convinced us that this shingle mill when new was not worth more than from $800 to $1000, and in its actual condition at the time of the fire was not worth more than $500.

Under these circumstances we feel ourselves obliged to give judgment for the defendants.

FRASER ET AL. *v.* McFATRIDGE.

DEFENDANT, with a view of securing $50 rent due to him by one Scott, purchased a lot of furniture from the wife of Scott, in his absence, and removed it to his own premises. Previous to this Scott had given plaintiffs, from whom he had purchased the goods, a chattel mortgage on them as security for the price. Plaintiffs having demanded the goods from defendant, who refused to give them up except on payment of $50, brought an action of trover, to which defendant pleaded, setting up a lien for rent, and a distraint on the goods after their removal to his own house.

Held, that the right to distrain ceased upon the removal of the goods from the demised premises to defendant's house.

THIS was an appeal from the County Court, District No. 1. The plaintiffs held a chattel mortgage over certain furniture in the possession of Donald Scott, who was the tenant of the defendant and owed the defendant rent, when the defendant, in order to secure his rent, purchased the goods from the tenant's wife, in the absence of the tenant, and moved them to his own premises. When plaintiffs demanded the goods, the defendant offered to give them up on payment of fifty dollars claimed to be due for rent, which plaintiffs refused to pay. After the demand was made by plaintiffs the defendant distrained or claimed to have distrained upon the goods on his own premises. Plaintiffs brought an action of trover for the goods, which was tried before JOHNSTONE, J., of the County Court, who gave judgment in their favor. The appeal from this judgment was argued this Term before SIR WILLIAM YOUNG, C. J., and DESBARRES, MCDONALD and WEATHERBE, JJ.

King, in support of appeal.—We rely upon our common law lien, admitting that there was no distress under the statute, but contending that there can be no conversion here till the plaintiffs satisfy the defendant's lien for the $50 rent due. Cites *Smith & Soden's Landlord and Tenant*, 125; *Woodfall's Landlord and Tenant*, 367, to shew that at common law the landlord can take the tenant's cattle or goods as a pledge for rent. (McDONALD, J.—But the defendant says he took the goods under purchase.) He took them before the purchase; he removed them on the 25th and agreed to purchase on the 28th of the month. Cites *2 Bacon's Abridgement*, title, "Distress."

Eaton, contra.—There was no common law distress here. The landlord at common law had to go on the premises, between certain hours of the day, and *seize* the goods on the premises *for rent*. *Smith & Soden*, 158. There is no lien for rent until the goods are distrained. There is no evidence here that these goods were distrained by the defendant on the premises. The evidence contradicts a taking as a distress. Cites *3 Kent's Commentaries*, 651; *Woodfall*, 391; *7 Exch.*, 852; *1 Campb.*, 12.

Attorney-General, in reply.—At common law where rent was due, the landlord had the right to go upon the premises and seize anything, not excessive in value, and remove it to any private place, a pound, or straight place, and keep it there forever. Cites *3 Thomas's Coke*, 273; *(Co. Lit.*, library ed., lib. 1., ch. 7., sec. 58, note to 47 b.;) *3 Comyn's Dig.*, 498, 502, tit. "Distress." These authorities shew that the landlord could take the furniture and put it in his own house. The landlord may or may not take advantage of the statutable provisions with regard to the distress. The statute has not abridged the rights of the landlord, nor does it compel him, but only enables him, to sell. There is no case in the books shewing any action against a landlord for not selling under the statute. This is not an action for alleged distress, but for conversion. The evidence shews that defendant's taking and removal of the goods was two days before the purchase of the goods.

This action can only be sustained by shewing a conversion, and there is no evidence of a conversion. Assuming the defendant to have proceeded on his common law rights, and to have been holding them as security for his rent, a demand

on the part of plaintiffs was necessary. There was no demand accompanied by a tender of the rent. The plaintiffs here cannot question the mode of our distress, their action being trover, and the only issue here being distress or no distress. There is no replication here setting up that our distress was illegal; all we have to prove is a taking for the rent. Assuming we are limited to proceedings under the statute, trover will not lie for goods sold under a distress. *1 H. Blackst.*, 13. (YOUNG, C. J., and MCDONALD, J.—That applies to the tenant.) But the plaintiffs are merely the tenant's assignees here. The plaintiffs could have brought an action on the case for illegal distress. Cites *7 T. R.*, 654; *1 Moody & Rob.*, 193; *9 Exch.*, 14. The last case shews that the statute does not apply, and that the notice under the statute is only necessary in case of a sale. It is also, like the two previous cases, an authority to shew that a party can justify under a distress though the taking was under some other pretence.

DESBARRES, J., now, (March 1st, 1879,) delivered the judgment of the Court:—

This was an action of trover tried in the County Court for District No. 1, for certain household furniture claimed by the plaintiffs under a bill of sale executed to them by one Donald Scott, duly recorded in the Registry Office of this County. The Judge of the Court below gave judgment for the value of the goods sued for, from which the defendant appealed to this Court, upon the ground of the judgment being against law and evidence, and that it ought to have been for the defendant, because of his lien on the property for unpaid rent.

It appears from the evidence that Scott, being the tenant of defendant, purchased the goods in question from the plaintiffs, who were carrying on the business of cabinet-makers, and being unable to pay for them, gave the plaintiffs the bill of sale under which they claim, as security for the price. The defendant, with the view of securing the payment of $50 due to him for a quarter's rent of the premises in the occupation of Scott, purchased the goods from the wife of Scott, in his absence, for a sum largely in excess of the rent due, with the understanding that he, (defendant,) would pay Scott the difference between the rent due and the price agreed on for the goods. The goods

were then removed by the defendant from the premises occupied by Scott as his tenant to the house occupied by the defendant himself. On receiving information of said purchase and removal of the goods, the plaintiffs demanded the property from the defendant, who admitted he had purchased it from Mrs. Scott, and expressed a willingness to deliver it up if the plaintiffs would pay him the said sum of $50 for rent. The plaintiffs refused to pay this rent, and immediately after brought this suit to recover the value of the property transferred to and claimed by them under the said bill of sale.

The defence set up in this suit by the defendant was that he had a lien on the property for rent, and caused the same to be distrained upon, in his own house, after the plaintiffs had demanded it, and we are called upon to decide whether such a distress as this, assuming it to have been made, of which there is no sufficient proof, was such as in law justified the defendant in withholding the property and precluded the plaintiffs from maintaining the present action for its conversion. The learned Judge below decided that the distress could only be made on some part of the demised premises, and that there was no proof that the distress or any of the subsequent proceedings were legal.

That the defendant's remedy by distress in respect of these goods ceased on removal from the demised premises to his own house there can be no reasonable doubt. The rule laid down by the learned Judge has been recognized as law from a very early period to the present time. See *Co. Litt.*, 161 a.; *Com. Dig.*, *Distress*, A. 3, B. 1. All the cases lay it down as a general rule that a distress can only be made on the premises chargeable with the rent, unless there has been a fraudulent removal of the goods from the premises, in which case the landlord may seize them wherever found as a distress for arrears of rent, and sell them as if they had been distrained upon the premises. By section 8, chapter 107, Revised Statutes, this seizure must be made within twenty-one days from the time of their being conveyed away. In *Rogers* v. *Birkmire*, 2 Str., 1040, an action of trespass for taking goods, the defendant justified that he demised some tenements to the plaintiff for one term, and others for another term, and, there being rent in arrears on both demises, he distrained the goods. This distress

on demurrer, was held illegal, for as there were separate demises there ought to have been separate distresses on the several premises subject to the distinct rents. In *Capel* v. *Buszard*, 1 Bing., 36, an action of trover was brought for two barges that were lying in the river Thames, attached by ropes to a wharf that was demised, but the land between high and low water mark where the barges were lying was not. The controversy was whether the barges were in a position which rendered them liable to be distrained upon, that is, whether by law a distress could be made upon property situated upon land which was not parcel of the demise, but land of which the tenant had at most an easement only. The Court of Exchequer held that the barges, not being on the demised premises, were not in law distrainable. See *Smith's Landlord & Tenant*, 153; see also *Smith & Soden's Landlord and Tenant*, 154.

There is no ground for disturbing the judgment appealed from. I think it is consistent with the law and evidence in the case, and that the appeal must be dismissed with costs.

IN RE LADD, PORTER & CO., INSOLVENTS, HALL ET AL., CLAIMANTS.

CLAIMANTS held the joint and several notes of Ladd, Porter & Co. as a firm, and of each of the two partners in their individual capacity, as security for a debt due by the firm.

Held, on appeal from the County Court, that under section 34 of the Insolvent Act of 1875 claimants were warranted in ranking on the firm estate and also on the private estates of the co-partners.

THIS was an appeal from a decision of SAVARY, J., of the County Court. The respondents had filed a claim against the estate of the insolvent firm of Ladd, Porter & Co., and also claims against the individual estates of the several partners, based upon a promissory note made jointly and severally by the firm and by the individual partners, and claimed dividends from each estate on the full amount of their claim. The assignee, who administered all the estates, declined to allow the claimants to rank on the several estates, on the ground that the claimants must elect upon which estate they would rank. The County Court Judge decided in favor of the

claimants that they were entitled to rank upon the firm and also upon each of the private estates.

The appeal from this decision was argued January 23rd, 1879, before SIR WILLIAM YOUNG, C. J., and DESBARRES, MCDONALD and WEATHERBE, JJ.

Meagher, in support of appeal.—The common law rule as to double ranking is established in the case reported in *7 H. of L.*, 785, where it was decided that, while claimants could prove against both estates, no claimant could get dividends against the partnership and private estates. At the time of that decision this section was in existence,—12 and 13 Vic., chapter 106, section 187, providing that dividends should be paid to all who had proved debts. In consequence of that decision section 152 was inserted in the Bankruptcy Act of 1861, (to be found in *1 Chitty's Statutes*, 368,) providing expressly for proof of claims and receipt of dividends in both estates where a debtor is liable on bills of exchange or promissory notes as a member of two firms, or as individual and as member of a firm. The corresponding section (37) of the English Bankruptcy Act of 1869 is to be found in page 82 of *Roche & Hazlitt on Bankruptcy*; it extends the provisions of section 152 of the Act of 1861 to all contracts. (YOUNG, C. J., refers to No. 76 of the General Rules on page 523 of *Roche & Hazlitt.*) The Act of 1861 speaks of dividends from both estates; while the Act of 1869 does not use the word dividends. Our Act does not say anything about dividends out of both estates. Our Act (of 1875) says, in section 84, "If a creditor holds security from the insolvent, or from his estate, or if there be more than one insolvent liable as partners, and the creditor hold security from, or the liability of one of them as security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon," &c.

Our contention is that the rule established in the case in *7 H. of L.*, 785, applies to this country, unless it is clearly abrogated by the provisions of our Act. This statute being restrictive of the Common Law, must receive a strict construction; *3 Swanston*, 664; *Dwarris*, 185. Great injustice will be done to both classes of creditors by giving the construction claimed here by the other side. The whole of this debt was a

partnership debt; by allowing it to rank against the private estate, it prevents the strictly private creditors being paid in full, as they otherwise might be, and swallows up the surplus that might go back to the partnership estate. Section 88 of our own Act is clearly inconsistent with the contention. It reads as follows: "If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full."

None of the commentators on the Insolvent Act of 1875 gives these sections the construction given by the Judge below. If section 84 warrants double ranking at all, its words restrict the creditor to ranking against "one" of the private members of the firm. (MCDONALD, J.—The Dominion Interpretation Act of 1867 makes words used in the singular number import more than one.) The claimants have elected here to look to the joint estate. The assignee paid them a dividend out of the joint estate, with notice that the private claims would be contested, and they kept it many months, *5 Maddock*, 419; *L. R. 18 Eq.*, 705; *2 Cox*, 218.

It appears from the evidence, and especially from the letters in evidence, that the claimants here knew that the firm of Ladd, Porter & Co., were insolvent when they took the note here. Consequently this was a case of preference in violation of the Act. *Bump on Fraudulent Conveyances, (Lib. Ed.,)* 38, 39; *24 Grant's (U. C.) Ch. Rep.*, 75-6; *2 R. & C.*, 254; *Clarke's Insolvent Act of 1875*, p. 87; also several cases, *Harvie* v. *Young* and others, in the Equity Court of Nova Scotia, not reported.

Ritchie, Q. C., contra.—The decision in *7 H. of L.*, 785, was given in 1859, but so unjust was the principle considered to be that in 1861 the Statute changed the rule. The original rule prevented not only getting dividends but proving against the several estates, or else the section cited from the English Act of 1869 is meaningless. The sections of the two Acts are to be found in *L. R. 7 Ch. Ap.*, 178. (YOUNG, C. J.—The question is whether the 84th section of our Act and the corresponding section of the English Act of 1869 are substantially equivalent.) The 84th section of our Act is more clearly in favor of our

contention than the English Act. It cannot be read so as to have any effect in regard to the case of firm and separate liabilities except on our contention. *L. R. 4 Ch. Ap.*, 49; *Clarke's Ins. Acts*, 253, quoting from Bankruptcy Reports. In the United States they have always allowed double ranking, following the English decisions before the Act of 1861. *2 National Bankruptcy Rep.*, 172, 371. There are two Canadian cases, *30 U. C., Q. B.*, 64; *14 Canada L. J.*, 13; *2 Reports of Ontario Court of Error and Appeal*, 161.

As to the question of undue preference, it is not taken in the grounds of appeal; the point is not sufficiently raised in the objection to our claim. The 6th objection, the only one touching the point, does not state that the taking of the individual names on the note was done in contemplation of insolvency. See section 95 of the Insolvent Act of 1875, as to the requirements of pleadings under the Act. It must be remembered that we are dealing with the estate of Byron P. Ladd, in whose estate these objections are filed. The contention of the other side now must be that Byron P. Ladd's private estate was insolvent, or that he contemplated individual insolvency at the time of signing this note. There is not a word in the minutes suggesting that Byron P. Ladd's private estate was insolvent, or that he contemplated individual insolvency at the time. (McDONALD, J.—There can hardly be said to be an undue preference against Ladd's private creditors, as he merely contracted a new debt when he signed the note.) The letters in evidence do not show that the note was given in contemplation of insolvency. The claimants merely asked for the note *in case* anything happened. The note was given early in 1874, and the parties did not go into insolvency till 1877. Cites *Clarke on Insolvency*, 324; *L. R., 1 P. C.*, 348. Byron P. Ladd could not give an undue preference to Hall & Co., because he was merely creating a new debt to Hall & Co., when he signed the note individually. There is no evidence here to meet section 130 of the Act, that Ladd, or even the firm, was insolvent within the knowledge of Hall & Co. The Insolvent Court has no jurisdiction to deal with this question of fraudulent preference. A bill should have been filed in Equity.

Pelton, Q. C., in reply.—The construction we put upon section 84 in connection with section 88 makes them consistent and

reasonable. The construction of section 84 by the other side makes it inconsistent with section 88. The case in *2 Cox*, already cited, shows that before the English Act of 1861, the creditor could prove against both estates, but must elect before receiving a dividend. The debt which the note represents, was the joint debt of the firm,—was contracted by the joint estate, in the words of section 88. (YOUNG, C. J.—But the signing of the note was a contracting by Ladd. The 88th section is certainly a very difficult one to construe.) One reason for the valuation to be put upon the security by the creditors was to determine his rights as to voting; section 84 and section 2, subsection *h*. If there were a surplus in the individual partner's estate after paying his private debts, section 84 would give the claimant something, and be perfectly reasonable, under our construction. In regard to the case cited from the Ontario Court of Error, section 88 is not mentioned by the Judge, and does not appear to have been brought to his notice. Cites *Story's Equity Jurisp.*, section 675; *9 Vesey*, 224; *Insolvent Act of 1875*, section 82.

It was argued that Ladd was solvent, but when the firm became insolvent the partners went into insolvency and their estates passed to the assignee. The judgment here deals with all three estates, and therefore it cannot be said that the estate of Ladd only is here. We want a judgment here settling the whole matter. The letters show that the claimants contemplated not merely the insolvency of the firm, but of Ladd individually. As to the jurisdiction of the Insolvent Court to deal with the question of undue preference, we are not asking to set aside the note, but to prevent the claimants ranking upon it.

DESBARRES, J., now, (March 1st, 1879,) delivered the judgment of the Court:—

This is an appeal from the judgment of the County Court for District No. 3, in which the question raised was whether the claimants, being creditors of the insolvent estate of Ladd, Porter & Co., and holding a note signed by that firm, and by each of the two partners thereof in their private and individual capacity as security for a debt due by the firm, were entitled to rank both upon the joint and separate estates of the said

insolvents, or upon the joint estate of the said firm only. The learned Judge, on argument had before him, and hearing the evidence produced on the subject matter of contestation by both parties, decided that the claimants were entitled to rank both upon the joint and separate estates of the insolvents, and from that decision the assignee of the said estates appealed to this Court upon the following grounds :—

1. That the claimants are entitled to rank only upon the joint estate of the insolvents, and not upon their or either of their separate estates for the amount due on the promissory note mentioned in the judgment.

2. That the amount was a debt contracted by the insolvents for and on account of their co-partnership business, and can only rank upon their separate estates after the separate creditors have been paid in full.

3. That the claimants are not entitled to rank upon the joint and separate estates of the insolvents for the said amount, but must elect upon which estate they will rank.

4. That the claimants have elected to rank upon and receive dividends from the joint estate, and have thereby waived and abandoned their right, if they had any, to rank upon or receive dividends from the separate estates of the insolvents, or either of them.

5. That the judgment is against law.

6. That it is against evidence.

It cannot be denied that where a creditor held the joint contract or personal security of the firm, and also the separate contract or personal security of individuals composing the firm, he was compelled by the English decisions before the Imperial Act of 24th and 25th Vict., section 152, upon the bankruptcy of some of them, to elect whether he would consider them as his joint or separate debtors. He was permitted to prove against both liabilities, but he was obliged to make his election from which estate he would demand a dividend. But the law, as I apprehend it, has undergone some change since the passing of the Act of 24th and 25th Vict., (1861), which, being confined to joint and several bills of exchange and promissory notes, was amended by 32 and 33 Vict., (1869), extending it to all joint and several contracts made by members of a firm. Section

37 of this last Act was substituted for section 152 of the previous Act. It is in these words: "If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts, as members of two or more distinct firms, or as a sole contractor and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts." There can be no doubt, it appears to me, that as against any such contractors as are here named a creditor would be allowed to prove and receive a dividend in respect of both estates respectively liable upon such contracts. It is true this section is not specifically embodied in the Insolvent Act of 1875, but I think the language of section 84 of that Act is fully as comprehensive and capable of the construction which the Judge below, on a careful examination, has given to it. It is not the same in words, but to my mind it is substantially to the same effect.

The case of *Ex parte Honey*. L. R., 7 Ch. Ap., 178, has an important bearing on the question under consideration, it being the first case decided under section 37 of the English Bankrupt Act of 1869. The circumstances of that case are very similar to the present. There the note, payable jointly and severally, was made by the firm of J. W. Jeffery & Co., and by two of the members of the firm in their individual character and capacity, and by two others not connected with or members of the firm, and it was held that the holder of the note was entitled to prove and receive dividends from the joint estate of the firm and the separate estate of the two partners who had signed the note. This is an authority to shew that in a case scarcely distinguishable from this, double proof has been allowed and dividends received in England, under section 37 of the Imperial Act of 1869. The question for us to decide is whether section 84 of the Dominion Act of 1875 will bear the construction that has been put upon it, and warrant the ranking of the claims of Hall *et al.* on the joint and separate estates of the insolvents. I am of opinion that it will, and, concurring in the elaborate judgment of the Judge who delivered it, I think the appeal ought to be dismissed with costs.

KENNY *v.* CITY OF HALIFAX.

UNDER the laws in force in relation to the city of Halifax, December, 1877, *Held*, that vessels, the owner whereof resided and did business in the city, but which were not registered in Halifax and had never been in the port of Halifax, were not assessable for city rates.

THE following case was entered into in December, 1877, between the parties in this cause :—

"Case entered into by consent of parties for argument before the Supreme Court at Halifax between the City of Halifax and Thomas E. Kenny. Thomas E. Kenny resides and does business in the City of Halifax, and is the owner of ships which are not registered in Halifax. The Assessors of the City of Halifax have valued the property of the said Thomas E. Kenny liable for city rates and have included therein the value of said vessels, as if they were within the city at the time of assessment. Said vessels were never in the Port of Halifax.

The question for the opinion of the Court is whether or not the said Thomas E. Kenny is liable, under the laws in force in relation to the City of Halifax, to be assessed for city taxes in respect of said vessels, or on account of his being the owner of them. If the Court should be of opinion that the said Thomas E. Kenny is liable to pay such taxes, judgment to be entered against him for the City of Halifax for the costs of preparing this case and argument ; otherwise, judgment to be entered for the said Thomas E. Kenny against the City of Halifax for such costs. It is, however, expressly agreed that this case shall not stay or interfere with the collection of the rates for this year, and no judgment given thereon shall involve the re-payment by the city of any rates already assessed.

The cause was argued February 4th, 1879, before SIR W. YOUNG, C. J., and MCDONALD, SMITH and WEATHERBE, JJ.

Ritchie, Q. C., for plaintiff, Thomas E. Kenny.—The interpretation clause in the City Assessment Law, (City Charter, section 347,) is inconsistent with other sections of the Act. The statute is *ultra vires* if it authorizes assessment on property not in the city. The assessment is on property, it is not upon a man's ability to pay. If you can tax Mr. Kenny's ships abroad, you can tax Sir William Cunard's, though he

resides in England. That shews that the construction contended for by the city is wrong. (*Attorney-General.*—There is a clause restricting the assessment to the city and its inhabitants.) That refers only to the County rates to be collected by the city and paid over to the County. Cites City Charter, sections 340, 347 and 361; *7 A. & E.*, 708; *12 A. & E.*, 227.

Attorney-General, for the city.—The *reductio ad absurdum* will apply both ways. The man who lives in Halifax, and derives in prosperous times a large income from ships built and registered in Maitland, would, according to Mr. Ritchie's argument, pay no taxes, while receiving from the city protection for his person and his wealth. The clause (347) which is sought to be overruled is not an interpretation clause, but a clause designating the property liable to assessment. In declaring that shipping outside the city should be liable to assessment here, the Legislature followed the common law principle that moveables followed the person. Cites *Story on Conflict of Laws*, section 378; *Broom's Leg. Max.*, 521–2; *3 Knapp's P. C. C.*, 406; *35 U. C. Q. B.*, 126; *37 U. C. Q. B.*, 51.

Ritchie, Q. C., in reply.—The section (347) is precisely like the section in an English Act called an interpretation clause in *7 A. & E.*, 708. Cites as to taxation of shipping under 43 Eliz., c. 2, sec. 1, *Bulstrode*, 354; *4 T. R.*, 771; *3 B. & C.*, 576.

WEATHERBE, J., now, (March 1st, 1879,) delivered the judgment of the Court:—

The following case has been submitted for the opinion of this Court, and was argued before us on the 8th of February:

Thomas E. Kenny resides and does business in the City of Halifax, and is the owner of ships which are not registered in Halifax. The Assessors of the City of Halifax have valued the property of the said Thomas E. Kenny liable for city rates, and have included therein the value of said vessels, as if they had been within the city at the time of the assessment. Said vessels never were in the Port of Halifax. The question for the opinion of the Court is whether or not the said Thomas E. Kenny is liable, under the laws in force in relation to the City of Halifax, to be assessed for city taxes in respect of said vessels or on account of his being the owner of them.

* * * * * * *

Section 330 of the Halifax Incorporation Act directs that "the City Council shall have power to assess *on the inhabitants and on the property within the city*, annually, such sum of money * * * as may be necessary." * * * Section 337 provides for swearing City Assessors "to make a fair and impartial assessment of the city." Section 339, with the amendment, directs "assessment upon the respective wards for all sums of money legally authorized," to be carried on simultaneously. It is enacted by section 340 that "the assessment shall be rated on the occupants of real estate, being yearly tenants, and in all other cases on the owners of property, by an equal pound rate upon the value of the *real and personal estate within the city*, whether such real and personal estate shall be possessed, occupied or owned by individuals, or by any joint stock company or corporation, and whether owned by parties resident or absent, according to the best knowledge and discretion of the city and ward assessors." * * * * Section 347 is introduced for the purpose of interpreting and defining the words, "personal estate," and enacts that under the term "personal estate" shall be included all household furniture, monies, goods, chattels, wares and merchandize kept in private or public premises, or in the Queen's or other warehouses; *all ships and vessels, or shares in ships or vessels, owned by persons residing, or having offices, or doing business within the city, whether such ships or vessels be at home or abroad at the time of assessment.*" Sections 359 and 360 provides for ruled blanks to form valuation books for the assessors of the respective wards, containing places respectively for the number of the ward, names of parties to be assessed, value of real estate, value of personal estate, and total amount on which assessment is to be levied. By section 361 it is provided that when the whole amount of property on which any person is to be assessed in any ward is determined, he shall be served with a notice upon a blank similar to that provided in the two previous sections. In the form of the prescribed notice the City Assessor is required to state the valuation of real and personal estate of the party to be assessed, "within Ward No. —— of the City of Halifax, on which assessment for the current year is to be levied," and he is also to state that any objection to be made is required in writing according to a form to be verified by

affidavit. This statement is headed for "Ward No. ——" and requires from the person assessed a sum to be filled in a blank opposite the following item:—"*Ships, or vessels, or shares, or interest therein, whether at home or abroad;*" and it is enacted by this clause that the return of ships, or vessels, or shares shall be made by the party in the ward in which such person shall reside. The form of affidavit directs the deponent to verify the value to be therein specified of the property including "personal estate" for which he was liable to be taxed "within Ward No. ——."

Counsel for Mr. Kenny contended that the power to tax personal property is limited in section 340 by the words, "within the city," which relate to the *situs;* and it is argued on behalf of the city that sections 347 and 361 require that all ships or vessels of every character whatsoever and wheresoever built, registered, or being, in which Kenny has any ownership must be assessed. And this liability would, of course, apply under the words of the Act to all non-residents "having offices or doing business in the city." The argument on behalf of the plaintiff is that we are to be controlled by the words of section 340, and that section 347, being an interpretation clause, does not extend the power given in the former section. The question is, how are we to construe the words authorizing the assessment of "personal estate within the city," in view of the words directing that this term, "personal estate," shall include "all ships or vessels or shares in ships owned by persons residing or having offices, or doing business within the city, whether such ships or vessels be at home or abroad at the time of assessment" The Attorney-General, on the argument, contended that the words of section 340 alone, notwithstanding the words "within the city," required a ship owned by Mr. Kenny, registered abroad, and which had never been in this port, to be taxed, on the principle of the well-known maxim that "personal property follows the person," and that such ships would be, in the eye of the law, property *within the city* where the owner resides. I suggested then that if this construction were correct—that if all the ships, home and foreign, of a resident are taxable—so may also be, under the same clause, all the ships of a foreigner, whose foot never touched our shores, taxable in this city, providing he carried on business

here. And I mentioned the case of foreign merchants owning iron steamships to the value, it may be, of millions, such as those of the Antwerp line, with a small agency or office for occasional coaling in this port. Are those owners liable to assessment on the value of all their ships,—ships, it may be, which have never been in this hemisphere? Or take the instance of such ships as those of the Cunard or Allan lines, whose owners may have offices or agencies, or do business, in the City of Halifax. If the ships, or shares of ships, of Kenny, whether home or foreign, which are not registered in, and have never been in, this port, are to be brought within the Act,—if that be the intention of the Act,—can we stop there? I think we could not stop there. And if the Legislature did not intend us to go further, how can it be said to have intended to include such a case as the one before us?

It may be observed here that the interpretation clause confined the power to tax ships only to cases where the owner *resided* in the city till 1860, when it was extended to those who had offices or did business in the city. A case decided by the Judicial Committee of the Privy Council was cited from *3 Knapp*, 406, where the judgment of the Court of Guernsey, that the practice of rating inhabitants in respect of personal property situated out of the island, existing for a long period, made a valid rate, and the opinion of the Vice-Chancellor, who delivered judgment, that it was highly reasonable that persons should be liable to the rate on their property, wherever it may be, was referred to. In that case the practice relied on had been confirmed by the Royal Court, which exercises a sort of legislative power, long previous to the assessment complained of, and by that practice there was an exception as to property in England and other places, which destroys any effect the case might have in favor of defendant. Could there be a doubt—if the case rested on section 340—that ships never registered in this port, and always sailing abroad, were not within the Act? I have examined the case of *Nickle* v. *Douglas*, decided in the Queen's Bench of Upper Canada in 1874, *(35 U.C. Q. B.*, 140,) and afterwards confirmed in the Court of Error and Appeal. Plaintiff, a resident of Kingston, held stock in a Bank in Montreal, for which he was taxed under the Kingston Act of Incorporation. It was held below that as personal property

owned out of the Province could not be rated, this Bank stock was exempt. The decision in the Court above went upon somewhat different reasoning. BURTON, J., there said:—"The Legislature, in defining what description of property shall be liable to taxation, have used the following language: '*All land and personal property in the Province of Ontario* shall be liable to taxation.' Taking the words of the statute in their plain, ordinary sense, they refer to the actual *situs* of personal property not less than to real estate; otherwise they would doubtless have used the words, 'all lands within the Province, and all personal property, wherever situate, owned by persons resident within the Province, shall be taxable.'" And PATTERSON, J., said:—"The general enactment of section 9 confines the assessment to land and personal property in the Province of Ontario. No property out of this Province is in any case assessable." *37 U. C. Q. B.*, 51.

The cases decided under the English statutes will assist us in the application of the maxim *mobilia sequuntur personam*, and may indicate to us the origin of the legislation respecting the assessment of ships. The English statute of 43 Elizabeth, passed nearly three hundred years ago, provided that the overseers of the poor should raise by taxation of every inhabtant such sum of money as might be required for the purposes of the Act. In 1633, upon complaint made to the Judge of Assize as to the mode of putting in force this Act for the levying of rates, it is reported in *Bulstrode*, p. 355, that the Judges here made their order for the better directions to the overseers for the time to come that they are to make their taxations and assessments well and duly and in an equal manner, according to the *visible estates*, real and personal, of such inhabitants within their town, * * * with a special charge to them given to be careful in this for the future." Afterwards, in 1791, Samuel White, a merchant, residing at the Port of Poole, was rated in the sum of £13,500 for personal property, which consisted of vessels employed in carrying on the Newfoundland trade from that port and monies invested out of the parish. The case was argued in the King's Bench, and Lord KENYON said, in giving judgment, (*4 T. R.*, 775,):—"This is a question of great difficulty and of vast importance to the public. The Statute of Elizabeth was passed to enforce what are called

duties of imperfect obligation. For it was a duty before that statute to relieve the poor and necessitous, and that Act was adapted to the enforcing their duties in the only way in which they could be enforced, namely, by raising a fund from persons who are deemed competent to pay it, and in the case in *Bulstrode* it was said that the rate should be on persons in respect of *visible property* locally situated within the parish. Then apply that rule to these cases. First, as to the ships, I think they are rateable. *This parish is their home, and must be so considered for the purposes of the Register Act.*" On a subsequent day His Lordship cited the following expressions of YATES, J., from an old report:—"If personal property be rateable, it is not to be done at random, and to leave the party rated to get off as he can, but the officer making the rate must be able to support what he has done by evidence." GROSE, J., said:—"I have no difficulty upon the question respecting the ships; they are rateable like stock in trade." By a statute of the 9 & 10 William 3, the poor were to be maintained by taxation of every inhabitant, and of all lands, houses * * * * and all stocks and estates *in the said town.* Ships registered at Hull, which usually traded to and from that port, were within the town of Hull *at the time when the rate was made*, and had made several voyages to and from that port during the year. The question respecting the liability of the owners to be rated was raised in 1824 in the King's Bench, and judgment was delivered by ABBOTT, C. J., who said:—"It is impossible upon this Act to say that lands within the town shall be rated, but that stocks and personalty within the town shall not. The stocks and personalty *are not rateable elsewhere*, they have all the benefit of the town, and there can be no reason therefore, when there are words sufficient to include them, that they should not be included. We are, therefore, of opinion that the stock in trade and ships yielding profit are liable to be rated." See *3 B. & C.*, 516.

Reading section 340 alone, I do not see how it is possible to say that a ship not registered at this port, and never in the port, though the property of an inhabitant of the city, can be subjected to assessment, because it cannot be said to be "personal estate within the city." Supposing, then, plaintiff to be exempt under section 340, in what position do the other

clauses place him? In *Nickle* v. *Douglas*, WILSON, J., said:—"We think this stock is not assessable here, because it is owned out of the Province. But if it were even doubtful the decision should be for the plaintiff, because whoever claims the right to impose a burden on the subject must establish clearly such a right." And PATTERSON, J., said in the Court above:—"The right to tax is given by section 9, and extends only to property *in the Province.* The party asserting the right to tax has thus the onus thrown on him to show that the property to be taxed is in the Province." As to section 347 a doubt is expressed by Lord DENMAN in the case from *7 Ad. & El.*, 491, cited by *Mr. Ritchie*, whether many interpretation clauses do not rather embarrass the Courts in their decisions than afford that assistance which they contemplate. The only words of section 340 interpreted by section 347 are, "*personal estate*," and we must remember in substituting the definition supplied to us by the Legislature in the latter section, that the former section still remains to be read with the substituted words. Formerly, there was great doubt whether ships came within the old Acts. They were decided to be rateable when they traded from the port and were registered at the port, and also when they were *home* at the time of assessment. It was required here in Halifax, however, to make them liable when abroad at the time of assessment, whether they traded from the port or not. What is now to be assessed—reading the two clauses together? "All ships and vessels, or shares in ships or vessels," *within the city*, "whether such ships or vessels be *at home* or abroad at the time of assessment." These are the words of the Legislature and not words supplied by this Court. As to the ships contemplated in the Act, may we not, however, apply the words of Lord KENYON—words wholly supplied in *The King* v. *White*: "This parish is their home, and must be so considered for the purpose of the Register Act"? The construction of general words confined the power of assessment to *visible property* under the earlier decisions. This was extended in the case of ships, but never to ships owned, registered, and being abroad from the place of assessment. I do not, however, find any words to confine the power to assess only to the ships or vessels of the plaintiff *registered* at the Port of Halifax, because he may have vessels on the stocks or own

such as are not required to be registered. A reason given in the cases for exempting property not having actual *situs* at the place of assessment from being rated is that it is liable elsewhere. This would apply to ships owned by Halifax merchants, and built and registered in another part of this Province or in another Province.

Under our law relating to county assessments, all the personal property within the county is liable to taxation, whether owned by residents or non-residents, and, within the definition supplied in the Act, ships afloat, whether in the Province or elsewhere, as well as ships or vessels on the stocks, are liable to the extent of half their value. If plaintiff owned a ship on the stocks or registered in another county, I cannot see how that would come within our city laws. Under the provision made for assessment in the City of Halifax, all ships and vessels, or shares in ships or vessels *within the city*, whether such ships or vessels be at home or abroad at the time of assessment, are liable to assessment. Any ships or vessels of Mr. Kenny on the stocks or not yet registered, or not of a character to require registration within the city, and all ships or vessels registered here, wherever they may be at the time of assessment, are liable, but I think the plaintiff, for the reasons stated, is not liable under any laws in force in relation to the City of Halifax to be assessed for city taxes in respect of ships not registered at, and which were never in the Port of Halifax; and this is the opinion of the Court.

SIR WILLIAM YOUNG, C. J., read the following opinion, concurring in the conclusion arrived at by WEATHERBE, J.:—

This case has arisen out of an apparent contradiction in the assessment clauses of the City Act, 27 Vic., Chap. 81, Sec. 340, 347, and 361, and to ascertain the true meaning and the governing principles of the Act, it will be well to trace it back to its origin. The first Act of Incorporation was passed in 1841, 4 Vic., Chap. 55, the 50th section of which provides that a rate or assessment shall be levied on real or personal property, or both within the city, and that such assessment shall not in any one year exceed 6d. in the pound on the assessed values of the property lying and being within the said city. In the Consolidating Act of 1848, 11 Vic., Chap. 39, the 88th section

provides that the ability and capacity of every inhabitant shall be computed in respect of his personal property and estate, which shall include and consist of all goods, effects and securities owned by such inhabitant, and situate and being within the city, and all ships or vessels, whether at home or abroad, or any parts or shares thereof, owned by such inhabitant, deducting ten per cent. from the value thereof. Another Consolidating Act passed in 1849, 12 Vic., Chap. 14, by the 66th section of which the term "personal estate" within the city, under section 65, was to include all ships or vessels, whether at home or abroad, or any parts or shares thereof owned within the city. The third Consolidating Act, prepared by the then Recorder in 1851, after imposing in section 11 an equal pound rate upon the value of the real and personal estate within the city, declares in section 12 that personal estate shall include all ships and vessels, or shares in ships or vessels owned by persons residing within the city, adding within hyphens, "whether such ships or vessels be at home or abroad at the time of the assessment." These last words are introduced for the first time, and are significant. The existing clause, section 347 of the Act of 1864, is exactly the same, but extending the assessment to ships or vessels owned by persons residing or "having offices or doing business" within the city. Now, the assessment in each ward has reference to a certain day, which, by the Act of 1874, cap. 30, shall be one and the same day in all the wards, and has reference to the property within the wards on that day; but a ship owned by a person belonging to the ward may not be within the ward on that day, and ought still to be assessable, and this, in my opinion, was the occasion and the true meaning of the words "whether at home or abroad" in the clause. To give it the large scope recently and now contended for, so as to embrace vessels not registered within the city, is at variance with the governing principles in all the Acts, and for this reason, were there no other, I concur in the opinion just delivered in favor of the plaintiff, conveying the true meaning, as I think, of the clauses in question.

EAGAR *v.* CAREY.

DEFENDANT, in a cause in the City Court, filed and served his grounds of defence, unsigned. The magistrate, after the plaintiff had been sworn, decided that the grounds were insufficient and directed judgment by default to be entered. Defendant brought the cause up by writ of certiorari.

Held, that an appeal lay from the judgment below, and, further, that nothing could be done with the cause under the certiorari, as the matter was a summary one, and the summary jurisdiction of the Supreme Court had been taken away.

THIS was an action that originated in the City Court. The grounds of defence were filed and served without being signed by the defendant or his attorney. After the cause had been called and plaintiff sworn, the Stipendiary Magistrate decided that the grounds of defence on file were insufficient, and directed judgment by default to be entered. Assuming that there was no appeal from a judgment by default, the defendant brought the matter before the Court by *certiorari*.

Foster, Q. C., (Feb. 22nd, 1879,) moved to make absolute a rule to quash the certiorari, explaining the circumstances connected with the judgment by default.

YOUNG, C. J.—I cannot assent as to the ground that there is no appeal from a judgment in that Court by default, where the party was present and attempted to defend. It is a mere formal defect and the defendant should have been allowed to amend.

Foster, Q. C.—That is a reason why a certiorari will not lie, because there was an appeal.

Besides this, I have cases to shew that a certiorari is too late after execution issued. (MCDONALD, J.—It is not too late within a year, and sometimes after that. But what are you going to do? We cannot try it; our summary jurisdiction is taken away.) If you quash the *certiorari*, we fall back upon our judgment below.

The COURT.—We advise you to refer the cause to a Barrister of this Court to report to the Court what judgment should be given.

Fielding, contra, reads affidavit of Deputy Sheriff Hamilton, correcting his previous affidavit herein. Reads affidavit of James McGregor as to what occurred in the Court below.

Foster, Q. C., objects to the latter on the ground that it is an affidavit that should have been used in obtaining the *certiorari*.

The COURT, *per* YOUNG, C. J.—A party obtains his *certiorari* on an *ex parte* application on affidavit. You come in with affidavits to set it aside and he is entitled to reply. We have always held that certiorari does not lie where there is an appeal, but is there an appeal where there is no trial? It is contended that there was no trial here.

Fielding.—Another ground for the *certiorari* is that the judgment is for debt and attorney's costs, although no attorney's name was on the account or writ.

Foster, Q. C., in reply, cites as authorities to show that the *certiorari* is too late, *Hilliard on New Trials*, 618, &c. (YOUNG, C. J.—These authorities do not apply here.)

The COURT intimated that the judgment by default had been improperly given, as the defect in the grounds of defence could have been amended at the trial, and that defaults could be removed in the City Court as in this Court, but they reserved judgment as to the other grounds.

SIR WILLIAM YOUNG, C. J., now, (March 1st, 1879,) delivered the judgment of the Court:—

This was a case originating in the City Court, brought against the defendant for money alleged to have been received by him as bailiff. The defendant, without consulting a lawyer, put in an informal defence, which the magistrate held insufficient, and judgment by default was signed by the plaintiff. The defendant, apprehending that there was no appeal from a judgment by default, brought the matter before this Court on a *certiorari*, and the cause is now before us on a rule to quash this writ. Now the case can be brought up from the City Court by *certiorari*, but then you can do nothing with it, as the matter is a summary one. The summary jurisdiction is taken away from us. We cannot try the cause, and there is nothing that we can do with it. This is an injustice. It was suggested that the matter should be referred to a Barrister of this Court, and Mr. Foster consents to that; but the counsel of defendant declines. Mr. Foster contended.

among other things, that a judgment by default was not subject to appeal. In this we do not concur, as the statute provides that an appeal shall lie from every judgment of the City Court. We think that the *certiorari* must be set aside, but without costs.

THE QUEEN *v.* BROWN.

DEFENDANT, having been convicted in the Police Court of an assault, entered into a recognizance with two sureties to keep the peace. Afterwards he was convicted of a second assault, and the Attorney General had the proceedings brought up by certiorari, whereupon,

The Court, holding that the mode of proceeding in England to estreat recognizances was wholly inapplicable to this Province, sanctioned the course pursued in the *Queen* v. *Thompson*, Thomson's R., 9.

SIR WILLIAM YOUNG, C. J., now, (March 10th, 1879,) delivered the judgment of the Court:—

In this case the Attorney General had the proceedings brought up from the Police Court by a writ of *certiorari*, from which it appeared that the defendant on the 20th of August last was convicted for a brutal assault upon his wife, and was sentenced to pay a fine of eight dollars, or to be imprisoned for eighty days and to keep the peace for six months. On the 16th September he paid the fine, and on the 18th he entered into a recognizance in the usual form with William Tierney and John A. Young, each in the sum of $80, that he would be of good behaviour and keep the peace towards all Her Majesty's subjects, but more particularly towards his wife, for six months from the date thereof. On the 8th November, however, the defendant was convicted of a second and still more ferocious assault upon his wife, and I am well pleased that the Attorney General, when an offense particularly abhorrent to the Court has been repeated, should have moved to render this and the like securities effectual.

The mode of proceeding to estreat recognizances in England is wholly inapplicable to this Province. It is described in an old book on the Exchequer now before me, fol. 82 to 85, in *4 Chitty's Criminal Law*, 484, in *Roscoe's Criminal Evidence*, 100, and other works. But we have no summons of the green

wax, nor clerks of the pipe, nor foreign opposers here, and a writ of *scire facias* is too costly and too slow a remedy. In the year 1856, therefore, in *The Queen* v. *Thompson*, 1 Thomson's Reports, 9, this Court sanctioned a simple form, which had been occasionally but rarely pursued, and should be brought into familiar use. An affidavit by the clerk of the Court, or, as in this case, of the clerk of the City Court, of a recognizance having been entered into by the defendant, of the signature of the officer, or Justice of the Peace, and its return into this Court, and the forfeiture, by non-appearance or otherwise, will lead to a rule *nisi* to enter up judgment on the recognizance, and to have execution. A copy of the rule together with a copy of the affidavit is to be served on each of the defendants, and unless sufficient cause is shewn, the rule will be made absolute, and execution will follow.

The only defect is that there is no provision for the costs, and, the proceeding being in the name of the Queen, there is no law for imposing them. This should be remedied by legislation, else recognizances will continue to be treated, as heretofore, as mere matters of form, and breaches of the peace as well as mere serious offences will go unpunished.

In the present case on service of a copy of Mr. Rhind's affidavit on each of the two sureties a rule for judgment and execution of $80 each will pass.

McLELLAND ET AL. *v.* JENNETT.

An award was made by the arbitrator in favor of the defendant. Subsequently to the award being made it was discovered by the plaintiffs' counsel that the arbitrator, a Judge of the County Court, had, while at the bar, prepared and read an affidavit opposing a motion made by plaintiffs' counsel for a reference. The arbitrator swore that he had had no recollection of this circumstance when he consented to act, and had never been consulted upon the merits of the cause, and that if he had opposed the motion referred to he had done so, not upon the defendant's retainer, nor as his counsel, but merely as a friendly act for the defendant's attorney.

Held, that the arbitrator was not disqualified.

THIS was an application to set aside an award made by J. W. Johnstone, Esq., Judge of the County Court, on the ground that he had, some time previously to the reference, drafted an affidavit for defendant and made a motion founded upon it at

the request of defendant's attorney, as a favor, and not under retainer as counsel. Judge JOHNSTONE, on the application being made to set aside the award, made an affidavit that he was not aware at the time he consented to act as arbitrator of the circumstance above stated, and that, if he had been aware of it, he would not have acted. The rule *nisi* to set aside the award was obtained at Chambers, and, on the motion to make it absolute, was extended and referred to the full Court. The cause was argued February 17th, 1879, before DESBARRES, MCDONALD, SMITH and JAMES, JJ.

Lynch, Q. C., in support of rule.—The only case on the point raised here is *Kemp* v. *Rose*, 1 Giff., 258. The fact of the arbitrator having drafted an affidavit for the defendant in this cause, and made a motion on his behalf in the cause, must have prejudiced his mind. The evidence, viewed in connection with the award, shews that the arbitrator must have been biassed. (MCDONALD, J.—You are now going into the merits.) The case of *Sumner* v. *Barnhill*, 3 R. & C., 501, decided this term in this Court, is a strong one in my favor. There it did not even appear that the arbitrator had ever been retained in the cause, but he was solicitor of the estate, which was one of the parties. He did not even sign the award. Judge JOHNSTONE here says in his affidavit that he would not, if he had remembered the facts now disclosed, have consented to sit as arbitrator, except by consent of both parties, on their both being aware of the circumstances. The case from *Giffard* is reviewed in *3 H. of L. C.*, 759.

Attorney-General, contra.—In *Sumner* v. *Barnhill*, the arbitrator, Mr. Longworth, had a general retainer for the estate, and that retainer was in force at the time of the reference. That retainer would not have been a legal objection if the arbitrator had retired from practice. Here the arbitrator had been raised to the Bench before the reference. *7 H. of L. C.*, 430; *3 Pugsley, N. B. R.*, 420; *3 H. & N.*, 766; *Broom's L. M.*, 138, (marginal); *LeBlanc* v. *McRae*, 2 R. & C., 240; *Hilliard N. T.*, 189; *1 R. & C.*, 54. *Russell on Arbitration*, 106; *10 Pick.*, 275.

Lynch, Q. C., in reply.—The cases cited are none of them to the point.

DESBARRES, J., now, (March 10th, 1879,) delivered the judgment of the Court:—

This is an application on the part of the plaintiffs to set aside an award made in favor of defendant for $999.52 by James W. Johnstone, Esq., the Judge of the County Court for District No. 1, who, by consent of both parties, was appointed under a rule of this Court an arbitrator to hear and determine all matters in difference between them in this cause. The application was made on the ground that the said James W. Johnstone, while at the Bar, was retained as counsel for the defendant in this cause, and was, therefore, disqualified from acting as an arbitrator therein. In support of this application an affidavit was made by Mr. Lynch, the attorney and counsel of the plaintiff, and read at the argument, in which it is stated that on examining the papers on file in the cause since the making of the award, dated 25th March, 1878, an affidavit therein, prepared by and in the handwriting of the arbitrator, and attested to by the defendant, was discovered among these papers to this effect:—

IN THE SUPREME COURT.

HALIFAX, SS.

Hugh McLelland and John McLelland, Plaintiffs.

vs.

Joseph R. Jennett, Defendant.

I, Joseph R. Jennett, of Halifax, in the County of Halifax, the defendant herein, make oath and say that this cause is not a fit cause for reference. That the matters in dispute do not consist wholly or in part of matters of account, which cannot be conveniently tried by a jury. That I claim a sum of money under a special agreement, as set out in my pleas, and that matters of law may arise requiring to be adjudicated upon by the Court or a Judge. That the plaintiffs' claim against me, if any, is not for merchandise, but for promissory notes that passed between me and the plaintiffs.

(Sgd.) JOSEPH R. JENNETT.

Sworn to before me this 11th day of November, A. D. 1873, at Halifax, in the County of Halifax.

(Sgd.) P. H. LENOIR,
Com. Sup. Court, Co. Halifax.

That on hearing of the existence of the affidavit, the circumstances connected with it, which he, (Mr. Lynch,) had entirely forgotten, were brought to his mind, and he then remembered that on applying to a Judge at Chambers for an order of reference in this cause in the month of November, 1873, the said J. W. Johnstone, as counsel for and on behalf of defendant, opposed the motion, and produced and read this same affidavit of defendant, now filed with the papers in the cause. That the matters referred to in said affidavit are part of the matters referred to in this cause, and upon which the said James W. Johnstone made his award, and that having been thus engaged and acted as counsel of defendant, he was for that reason incompetent, and disqualified to act as an arbitrator thereon. Another affidavit, made by William F. DeBlois, the agent of plaintiffs, was also produced by Mr. Lynch, at the argument, for the purpose of being read on the part of the plaintiffs, but on finding it to be merely a statement of facts proved before the arbitrator by one Porteus, a witness for plaintiffs, and of facts within his own knowledge, we refused to receive it, as having no bearing whatever on the question involved, which we considered to be solely a question of competency or incompetency of the arbitrator to act as such under the circumstances disclosed in the affidavit of Mr. Lynch.

If it had been clearly shewn that the arbitrator had been retained and acted as the counsel of the defendant, knowing the nature and merits of the case and the defence intended to be set up thereto, we would have felt ourselves constrained to deal with it as we lately did in a somewhat similar, though much stronger case than this. But the statement and explanation of the arbitrator clearly shews that he was never retained by the defendant or any other person in his behalf, and never consulted in, but was entirely ignorant of the merits of the case, and that the writing of the affidavit and the reading of it before a Judge at Chambers in opposition to a motion to refer the cause were done at the request of Mr. Kirby, the attorney of the defendant, not on his or defendant's retainer as counsel therein, but as a friendly act, such as members of the Bar are constantly in the habit of doing for each other, without knowing anything whatever of the merits of the cause. Let us see what answer the arbitrator has him-

self furnished to the statements of Mr. Lynch. "When," he says, "I consented to act as an arbitrator I had not the slightest recollection that I had ever heard of the cause, or the remotest conception that I had ever been consulted with reference to it in any way. At the hearing I had not the slightest recollection of any of the facts of the case, nor do I believe that the merits of the case were ever in any way brought to my notice by any one. About the time the jurat of the affidavit alleged to be in my handwriting is dated, Lewis R. Kirby, who was the attorney of the defendant on the record, was in the habit of frequenting my office, talking on his own business and asking questions regarding the practice, etc., and the affidavit alleged to be in my handwriting and among the papers in the cause, and which has no bearing on the merits of the case, must have been drafted by me as a friendly act for the said Lewis R. Kirby from facts detailed by him without any consultation with the defendant, and not in any way on his retainer or as his counsel. If I did oppose the motion to which Mr. Lynch refers, in November, 1873, it was made for Mr. Kirby, and not as counsel of, or on the retainer of the defendant. My award was honestly made up on a just and fair basis and according to the weight of the evidence, with this exception, that it was less favorable to the defendant than it would have been had not I governed myself by the strict rules of evidence." The defendant, in his affidavit, which was also read at the argument, says: "I signed and swore to the affidavit, a copy of which is annexed to the affidavit of said Peter Lynch marked "A," but I never knew that the said affidavit had been made and prepared or written by the said James W. Johnstone until after the award herein was made, etc. The said affidavit was brought to me to sign and swear to by my said attorney, Lewis R. Kirby. I never retained the said J. W. Johnstone as my attorney or counsel in this cause, or in any other matter or thing relating to this cause. I never paid him any fee, nor did I ever speak to him or he to me about any matter relating to this cause excepting as arbitrator after the rule of reference had been made herein, nor had I the slightest knowledge, when I consented to the appointment of the said James W. Johnstone as arbitrator, or when I signed the said rule of reference, that the said James W. Johnstone

had ever had any connection with the cause or prepared or written any affidavit herein, or had appeared for me in any motion or proceeding in this cause, as stated in the affidavit of the said plaintiffs' attorney. I had no knowledge thereof, nor have I now the slightest knowledge thereof, excepting from reading the affidavit of said Peter Lynch."

There is also an affidavit of Mr. Thompson, the present Attorney-General, who states that since the death of Lewis R. Kirby, which took place about two years ago, he had the management of this cause on behalf of defendant, and never heard until after the award was made that Jas. W. Johnstone, Esq., had ever taken any part in the same.

The learned counsel for the plaintiffs, at the argument, relied on the case of *Kemp* v. *Rose*, 1 Giffard, 258, and contended that the existence of any circumstance in the situation of the arbitrator to whom the decision of this case was entrusted which tended to produce a bias in his mind would justify the interference of the Court. In that case the builder, by his contract, bound himself to abide by the decision and certificate of an architect as to the amount to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount. The Court did not consider the decision of the architect, made under such a bias as binding, but gave directions, so as to ascertain, under the authority of the Court, how much remained justly due to the plaintiff. That was a very different case from this. There the architect had made a calculation and formed an opinion as to the cost of the work before it was commenced, and given an assurance, though he refused to give a guarantee, that the cost of the building would not exceed a certain sum. Here the arbitrator entered upon the investigation of a matter of which he had no previous knowledge, and made an award which he considered just, and, according to the weight of the evidence before him, excepting only that it was less favorable to the defendant than it would have been had he not, as he affirms, been governed by strict rules of evidence. And it is sought to be set aside because, in 1873, the arbitrator, at the request of the attorney of defendant, without knowing anything of the merits of the case, wrote an affidavit and moved upon it at Chambers in

opposition to an application to refer the cause, not, however, as a retained counsel, but as a friendly act for the defendant's attorney, which he had entirely forgotten and which Mr. Lynch, the attorney and counsel of the plaintiffs, had forgotten, as well as himself, until after the award was made.

I am not astonished that the case of *Kemp* v. *Rose* is the only one that could be found having any bearing upon this application, in which, without any charge of misconduct of the arbitrator, and upon no other ground than the performance of a friendly and gratuitous service for the attorney of the defendant, we are called upon to set aside his award. I do not think such an act or service as this can be considered as a disqualification for acting as an arbitrator, more particularly where the act done was within the knowledge of Mr. Lynch, the counsel of the plaintiffs, who, if it was considered to be of a character likely to create a bias on the mind of the arbitrator, ought to have mentioned it to him. But it was not spoken of until the affidavit was searched for and found among the papers in the cause after the award of the arbitrator was made and the functions of the arbitrator had ceased. In *Thellusson* v. *Rendlesham*, 7 H. L. C., 430, it was held that a counsel in a cause, who was afterwards raised to the Bench, was not precluded from taking part in the hearing and discussion of that case, though he might have declined to do so, as the arbitrator here, though not a retained counsel in this cause, would have done had he been reminded, as he ought to have been, of the small professional service he had rendered for the defendant's attorney without the knowledge of his client. In *Wheeler* v. *Stewart*, 3 Pugsley, 410, DUFF, J., having been consulted while at the Bar upon some points in that case, said his attention had been called to the case of *Thellusson* v. *Rendlesham*, and, in view of the decision in that case, and of the circumstance that the Court was equally divided, and that there could be no judgment, he consented, at the request of his brethren, to act in the case. These, it appears to me, must be regarded as exceptional cases in which a Judge thus situated may act if there be strong and urgent reasons for his doing so, or decline to act if such do not exist. If, then, a Judge in this position is not disqualified, I do not see anything to preclude an arbitrator in like circumstances from acting, particularly where he is

requested by both parties, as in the case before us, to do so. The ground upon which the award is attacked is an exceedingly feeble one. It has been fully and satisfactorily answered by the arbitrator as well as by the defendant, and we think it due to the arbitrator to say that there is nothing in the case to shew that in making his award he acted under a bias or with any disposition to favor either of the parties. We are all of opinion that the award must be sustained and that the rule *nisi* for setting it aside must be discharged with costs.

MORRISON *v.* FISHWICK.

PLAINTIFF, in November 1876, at the request of one McKinnon, shipped by defendant's steamer certain goods, of which he took a bill of lading, requiring them to be delivered to the order of the shipper at Bayfield. At the foot of the bill of lading was a memo., stipulating that the goods were to be taken from alongside as soon as the vessel was ready to discharge, otherwise to be landed by the master, and warehoused at the expense and risk of the consignee. Plaintiff first charged the goods to McKinnon, but afterwards, on the same day, to one Thompson. On the 8th November plaintiff wrote McKinnon; "We are this day shipping your goods per 'M. A. Starr;' we have drawn upon you for $412 on account. Please protect draft." No one being present on the arrival of the steamer to take charge of the goods for the consignee, they were warehoused and, the day after, McDonald, the keeper of the warehouse,—which was the property of a company in which it did not appear that defendant had any interest,—delivered the goods to McKinnon. There was evidence of an understanding between McKinnon and Randall, the defendant's agent at Bayfield, that the former was to deliver all goods, unless forbidden by Randall. McKinnon dishonored the draft at maturity, and plaintiff then, for the first time, endorsed the bill of lading to Thompson, who demanded the goods from Randall, after which plaintiff brought an action of trover.

Held, that under *R. S.*, cap. 94, sec. 164 and 166, defendant could not, under a plea denying the conversion, avail himself of the defence that the goods were not the property of the plaintiff;—that the goods had been lawfully warehoused by the defendant; that the possession of the warehousemen was not the possession of the defendant, and their failure to deliver the goods did not constitute a conversion by defendant;—further, that even assuming that Randall had caused the goods to be delivered to the wrong party, it did not follow that defendant was liable, as Randall was merely his general agent, and had no authority from him to interfere with the goods, or direct McDonald to interfere with them after they were warehoused.

Verdict for plaintiff set aside without costs, as the view taken by the Court was not presented by defendant's counsel at the trial, and no cases in support of it were cited at the argument.

THIS was an action of trover for goods shipped by plaintiff, under bill of lading drawn to his own order, in a vessel of defendant, from Halifax to Bayfield in the County of Antigonish. The bill of lading directed the goods, which were addressed to McKinnon, to be warehoused at Bayfield at the consignee's risk, which was complied with by defendant. The

warehouse keeper delivered the goods to the agent of one McKinnon, who produced a letter from plaintiff to McKinnon, informing him that he had that day shipped goods, (the goods in question,) to him, and drawn upon him for $412. The draft was accepted, but dishonored by non-payment at maturity. The defendant pleaded the delivery of the goods to McKinnon under plaintiff's letter as an equitable plea. The cause was tried at Halifax, before Mr. Justice SMITH, without a jury. Judgment was given for plaintiff and a rule *nisi* granted returnable to the full Court to set the same aside. The rule *nisi* to set the verdict aside was argued, February 20th, 1879, before DESBARRES, MCDONALD, SMITH and JAMES, JJ.

Tupper, in support of rule.—The defendant's liability here as shipowner ceased at the landing of the goods, at the port of delivery, from the the ship's deck. Cites *2 Aspinall's Mar. Cases*, 310. The plaintiff here has not proved conversion. The contract in the bill of lading was that defendant was to warehouse the goods. When plaintiff's agent made a demand for the goods, defendant's agent informed him that the goods had been warehoused in pursuance of the terms of the bill of lading. The warehousing of the goods was delivery to plaintiff. (MCDONALD, J.—The case of *Pugh* v. *Wylde*, decided in this Court, and reported in *2 R. & C.*, 182, is a strong case in your favor to shew that the property in the goods had passed.) There is clear evidence of a sale here in the plaintiff's letter in evidence and his draft on McKinnon for the value of the goods. *Kay on Shipping*, 376.

Meagher, contra.—The defendant cannot succeed here for want of sufficient pleas. The first plea merely denies conversion. The second is an equitable plea, alleging authorization for delivery by the letter in evidence. There is no plea denying plaintiff's property. *R. S.*, chapter 94, sections 144 and 146. In the case cited from *2 Aspinall* there was a plea alleging performance of the contract in the bill of lading. Here the parties who delivered the goods to McKinnon were defendant's agents. It is not even shewn in the evidence that plaintiff's letter to McKinnon was ever shewn to the parties who delivered the goods to McKinnon. Plaintiff swears that the goods were charged to McKinnon the day they were shipped, contrary to his orders, but that the mistake was

corrected the same day, and in this he is corroborated by the book-keeper and uncontradicted. Cites *2 B. & Ald.*, 704; *4 Bing.*, 476; *8 M. & W.*, 443. (McDONALD and JAMES, JJ.—This letter is very strong; it states, "I have this day shipped your goods." McDONALD, J.—If the placing of the goods in warehouse was legally done, in fulfilment of the bill of lading, it did not need to be specially pleaded after denial of conversion.) The letter is easily explainable in this way; Morrison had agreed with McKinnon that these goods were to be shipped for him, but held under Morrison's order, until certain remittances were made by McKinnon. Morrison states also that the amount of the draft was to balance McKinnon's account after the remittances were made. The goods were given away by Fishwick's agent, Randall, who swears that McDonald delivered goods from the warehouse in pursuance of an agreement made between them that he was to deliver all goods which came by the "M. A. Starr," unless forbidden by him. He therefore consented and was a party, as Fishwick's agent, to the delivery to McKinnon. (McDONALD, J.—But was not Randall your agent too?) No. Cites *L. R., 9 Exch.*, 86. The agency of Randall is proved for all purposes, and is not limited by any proof on the part of defendant. (McDONALD, J.—But what about the bill of lading?) We have nothing to do with the bill of lading here; you cannot give the defendant the benefit of performance of a contract he has not pleaded. *Benjamin on Sales*, 306; *L. R., 7 H. of L.*, 757. In *Pugh* v. *Wylde*, the defendants pleaded want of property in plaintiff.

Tupper, in reply.—The plaintiff has saved us the necessity of pleading want of property here by shewing in his own documentary evidence that the property had passed out of himself. The second plea alleges that the goods were legally delivered to McKinnon under the letter of plaintiff. Randall is not shewn by the evidence to have been a party to the delivery of the goods. Randall says he gave no orders for the delivery of the goods. The right of forbidding the delivery of the goods alleged to be retained by Randall, under agreement with McDonald, meant merely that McDonald would not deliver goods on which Randall, as Fishwick's agent, claimed a lien for freight.

The circumstances here, as shewn by the written evidence and Morrison's testimony, indicate an intention on Morrison's part to play a double game, leading McKinnon to believe the goods were his, and at the same time intending, in case the draft was not paid by McKinnon, to claim the goods.

McDONALD, J., now, (March 11th, 1879,) delivered the judgment of the Court:—

In November, 1876, the plaintiff, at the request of one McKinnon, shipped by the steamer "M. A. Starr," of which the defendant is owner, a quantity of goods for which he took a bill of lading requiring them to be delivered to the order of the shipper at Bayfield, in the County of Antigonish. At the foot of the bill of lading and above the signature of the defendant, is a stipulation as follows:—"Weight, contents, and value unknown, and not answerable for breakage or leakage. The goods to be taken from alongside immediately the vessel is ready to discharge, or otherwise they will be landed by the master and warehoused at the expense of the consignee and at his risk of fire, loss or injury." The goods were first charged to McKinnon, in the plaintiff's books, but afterwards, on the same day, charged to one William Thomson. On arrival of the steamer at Bayfield, and when she was ready to discharge, no one was present to take charge of the goods for the consignee, and they were warehoused according to the bill of lading. Meantime the plaintiff drew upon McKinnon, on the 8th of November, and, at the same time, wrote to him, saying: 'We are shipping to-day, per 'M. A. Starr,' your goods. We have drawn upon you for $412 on account. Please protect draft." The price of the goods was $410.60. The draft was accepted by McKinnon, but not paid at maturity, and the plaintiff had to retire it. After that he communicated with Thomson, to whom he endorsed the bill of lading, for the first time, and who then demanded possession of the goods. This was in January. It was from Randall, the agent of the defendant at Bayfield, that the goods were demanded. The warehouse is the property of a company, and the defendant does not appear to have any interest whatever in it. Mr. Randall testifies that one McDonald, who appears to have charge of it, is the employe of the company. McDonald delivered the goods to McKinnon

the day after they were landed, in November, and after the demand of possession, the plaintiff brought this action, which is trover, against the defendant. The pleas are,—no conversion, and a plea on equitable grounds under the facts mentioned and on other grounds set forth in the plea, but not proved.

It was contended at the argument that, under the evidence, the property had passed to McKinnon, and that the plaintiff had parted with his interest in it. And if the defendant, in pleading, had denied that the goods were the property of the plaintiff, he might well have cited the case of *Pugh* v. *Wylde*, 2 R. & C., 182, in support of his contention. There, as here, the bill of lading required the goods to be delivered to the order of the consignor, Pugh, though shipped at the request of one McFatridge, to whom they were not charged, though there appears to have been some memorandum of them made by the consignor, Pugh, who insured in his own name, and, as he said, for his own protection. The goods having been lost on the voyage, Pugh brought his action against the underwriters, but it was held that he had parted with his right to the goods, and retained no insurable interest in them. It is true that McFatridge made payment to Pugh after the loss, but that could not affect the question as to whether or not the consignor had parted with his interest in the goods at the time of taking the policy. I had the misfortune of being obliged to give a dissenting opinion in that case, but if, here, the question of the right of property could arise under the pleadings, I think that the evidence is much stronger in favor of the defendant than in the one just referred to. Under chapter 94 Revised Statutes, sections 144 and 146, that defence is not open to the defendant, as he did not plead it, nor do I think that his defence on equitable grounds can avail him. That the goods were lawfully warehoused according to the bill of lading I entertain no doubt. They were, then, no longer, in my opinion, at the risk of the defendant, whom the bill of lading authorized, under the facts in proof, to have warehoused them "at the expense of the consignee, and at his risk of fire, loss or injury." The possession of the owners of the warehouse was not, after that, the possession of the defendant, and a demand of the possession coupled with a non-compliance with the demand, when it is in evidence that compliance was impossible, as the defendant had

not the possession himself, is no evidence whatever that the defendant converted the goods to his own use; and the plaintiff must give evidence of some *act* of conversion by the defendant or by some one authorized by him before he can succeed in this action. We have it in evidence that Randall is the agent of the defendant, or, as he says, "of the 'M. A. Starr;'" but was it within the scope of his authority, as such agent, to interfere with the plaintiff's property after it was warehoused, according to the bill of lading? I think it was not. In his evidence he says: "There was an understanding between McDonald and me that all goods he was to deliver unless he was forbidden by me." Deliver to whom? Surely not to any other than the person entitled to the possession, and only to the person entitled when no reason existed for refusing to deliver them in the estimate of Randall. But, taking even the plaintiff's extreme view of the case, and assuming that Randall had caused the goods to be delivered to the wrong party, we must consider whether or not the defendant authorized him (Randall) to do so. If a wrongful act was done, at the instance of Randall, for which he might be held liable, it does not follow that the defendant is liable for the same act, simply because Randall was his general agent. An agent cannot bind his principal by an act or declaration which is out of the scope of his authority. If one employs another to do a lawful act, and, in doing so, he commits a public nuisance, the employer is not responsible, (*Peachy* v. *Rowland*, 13 C. B., 182,) but otherwise if the act to be done necessarily involves the committing of a public nuisance *(ib.)* Even admitting that the goods in question were delivered to McKinnon at the instance of Randall, I cannot think that it was within the scope of Randall's authority to authorize the delivery of them otherwise than as mentioned in the bill of lading. A refusal by the general agent of a party, after demand, is no evidence of a conversion by that party. It must be shewn that, in the particular act of refusal, the agent acted under the special directions of his principal. *Pothonier* v. *Dawson*, Holt's N. P. C. ,383. An agent employed generally to do an act is only authorized to do it in the usual course of business. Therefore, as stock is usually sold for money only, a principal is not bound by the act of a broker employed by him who sells it upon credit, without a special authority,

though acting *bona fide* and with a view to the benefit of his principal. *Wiltshire* v. *Sims*, 1 Camp., 258.

Where the agent of a wharfinger whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had never been received, the principal was not responsible, because it was not within the scope of the agent's authority, in the course of his employment, to give such a receipt. *Coleman* v. *Riches*, 16 C. B., 104. In this case there is no fraud, but in all cases of this kind, whether there be fraud or not, the liability of the defendant as principal must necessarily depend upon the fact of his having authorized the commission of the act complained of. But was McDonald the agent of the defendant at all? I think not, and I think, further, that he was not even the agent of the defendant's agent. This is an action for a wrong, and the evidence ought to leave no doubt of the defendant's having authorized the act complained of, or some other act which necessarily involved it, to justify us in holding him liable. Randall says; "The warehouse is the property of a company," and again he says; "McDonald was the employé of the company." We are not, however, considering the liability of the company, but of the shipowner, though it would seem that the learned counsel for the defendant did not, at the trial, draw that distinction. Even admitting that the understanding which existed between Randall and McDonald was such as to render Randall liable for a conversion, I can find no evidence that the defendant authorized Randall to interfere with the goods after they were warehoused, or to direct McDonald or any one else to do so. The evidence appears to me to be the other way. The agreement was between the plaintiff and defendant themselves,—I mean that contained in the bill of lading,—to warehouse the goods at the expense of the consignee in case he was not prepared to take charge of them when the vessel was ready to discharge, and it did not warrant any subsequent interference on the part of Randall to hand the property over to a wrongful claimant, although he was the general agent of the defendant.

By the minutes taken at the trial, it would seem that counsel on both sides thought that the defendant was identified, in some way, with the company owning the warehouse, but there

is no evidence whatever of such being the case, or of the defendant ever having assumed, through his agent or otherwise, to instruct the keeper of the warehouse how he should dispose of the goods landed from the "M. A. Starr." The view that I take of the case does not appear to have been presented by the defendant's counsel at the trial, nor were there any authorities cited at the argument in support of it; and I can readily understand, therefore, how the learned Judge who tried the cause arrived at the conclusion that the plaintiff was entitled to recover. I am of opinion that a new trial must be granted, but, for the reasons mentioned, without costs.

EVANS ET AL. *v.* FOSTER.

In an action by the endorsees against the endorser of a promissory note, the defendant pleaded traversing the allegation of presentment. The messenger of the bank that held the note swore that he presented it at defendant's office, where it was payable, between 3 and 4 p. m., when said office was closed. Defendant denied the presentment and denied that the office was closed, but did not deny that he had been informed of the presentment next day, and he did not deny or refer to the statement of one of the plaintiffs, that on his showing the defendant the notice of dishonor the defendant had promised to give a good note in place of the dishonored one, or else supply goods to the amount of it. The County Court Judge set aside the plea as false, &c., on the strength of the uncontradicted evidence of this promise.

Held, on appeal, that the only question for the Court, under the pleadings, was whether the note had been actually presented, and that plaintiffs could not be said to have established the fact of presentment, as there was a contradiction.

THIS was an appeal from a decision of JOHNSTONE, J., of the County Court, setting aside a plea denying presentment in an action by the endorsees against the endorser of a promissory note. The cause was argued before MCDONALD, SMITH, JAMES and WEATHERBE, JJ., by *Foster, Q. C.*, for plaintiff, and *Bligh* for defendant, who cited *Chitty on Bills*, 577, and *5 M. & W.*, 14.

WEATHERBE, J., now, (March 10th, 1879,) delivered the judgment of the Court:—

This was an action by the endorsee against the endorser of a promissory note, in the County Court, at Halifax, and the only plea was one traversing the allegation of presentment. The appeal before us is from a decision making absolute a rule *nisi* to set aside that plea. The bank messenger swears

positively that he presented the note sued on at the office of defendant, where it was made payable, between the hours of three and four p. m., at which time the said office was closed. The defendant positively denies the presentment, and also denies that the office was closed, but he fails to deny the statement in the messenger's affidavit that he, (the defendant), was informed of this presentment on the next day, nor does he deny or refer in his affidavit to the statement sworn to by one of the plaintiffs, that after the note became due he shewed the defendant the notice of dishonor which plaintiffs had received from the bank, then the holder of the note, when defendant stated that "he was unable to pay it then, but would give a good and sufficient note in place of it, or failing in that would supply goods to cover the amount due on the said note." The learned Judge upon this says: "I must assume that the defendant made this promise with full knowledge of the want of presentment, and, accepting this version of the facts, *Croxen* v. *Worthen*, 5 M. & W., 5, is a case in point that where the fact of presentment was in issue a promise to pay after the bill was due was *prima facie* evidence of the fact." Lord ABINGER said: "The defendant is the party to pay the note which he made payable at a particular place. As against him it appears to me that his subsequent promise admits all that was necessary to entitle the plaintiff to recover." Because the subsequent promise of defendant to one of the plaintiffs mentioned above was not denied, although the presentment was denied in defendant's affidavit, the learned Judge was of opinion that he was justified in treating the plea as false, and so set it aside with costs, and gave plaintiffs judgment. Since the presentment is denied must we not assume that there was no presentment, and is not the question whether this promise, (being a promise against interest after maturity of the note,) is to be regarded as evidence that the defendant knew of the *laches*, and does this constitute a waiver of presentment? The language of ALDERSON, B., in the case of *Croxen* v. *Worthen*, relied on by the learned Judge below, indicates the principle upon which that decision was made: "The defendant is supposed to know the law. He knows therefore that he is not liable unless the note has been duly presented. With that

knowledge he undertakes to pay it. Is that not evidence *for the jury* that he knows it was presented."

There is a large number of cases on the point in the English reports, although only two were cited on the argument, and there are conflicting decisions, but it seems to be clear that presentment and notice of dishonor must be distinctly averred, and if they are excused or dispensed with, the grounds of excuse or dispensation must be pleaded, otherwise they cannot be given in evidence. The question, therefore, under the pleadings here, as the case was presented to us on the argument, would seem to be whether the note was actually presented, which the plaintiff cannot be said to have made out, because there is a contradiction. A distinction often lost sight of is that the promise to pay is to be regarded as a waiver of *proof* of presentment, and not as a waiver of the presentment itself. The promise to pay, it seems, is only to be regarded as *prima facie* evidence, and is open to rebuttal. A question might, possibly, also arise here whether the promise was sufficient. Where there had been an offer to pay costs and the residue on time, this was held insufficient in *Slandize* v. *Creighton*, 5 C. & P., 406, to dispense with proof of notice, and Lord DENMAN said: "The defendant might, if time had been given him, have been willing to have waived any objection with respect to the notice of dishonor." See also *26 E. L. & Eq. R.*, 283; *1 C. & K.*, 552. But there are many cases which it must be admitted would seem to be authority for supporting the promises made by defendant here as *prima facie* evidence. In commenting on some of the English decisions, PARSONS, J., (as cited in *2 Daniel on Negotiable Instruments*, section 1160,) says: "Some of the cases have almost gone so far that the only safe course for an endorser or drawer, when payment is demanded of him, would be expressly to deny both presentment and notice." *1 Moo. & R.*, 41; *1 Q. B.*, 814; *11 C. B.*, *(2 J. Scott,)* 1010; *1 Starkie*, 28.

By plaintiffs' affidavit it appears that the transaction out of which this note arose was the purchase by defendant from plaintiffs of goods for which he gave his own note at three months, and, not being able to meet this at maturity, he requested further time, which plaintiffs agreed to give upon his giving them another note at three months, which he accordingly did by delivering them the note in question, payable at his

own office. This is entirely uncontradicted, and must be assumed, I suppose, to be true. *Sharp* v. *Bailey*, 9 B. & C., 44, is authority to shew that where the drawer of a bill made it payable at his own house the jury might fairly infer that it was an accommodation bill, which made it unnecessary to give him notice of non-payment, and the Court refused to set aside a verdict so found. This was assumpsit by the endorsee against the drawer of a bill accepted by A. payable to the drawer or order, and by him endorsed to plaintiff. There were money counts and account stated. *Story*, in his work on bills, sec. 370, cites this case, with several others, respecting the principle applied to the drawer, and continues; "and although, in general, indorsers are entitled to insist upon a due presentment for payment to the acceptor at the maturity of the bill when it is drawn for the accommodation of the drawer, yet if the bill is drawn and accepted for the accommodation of any particular indorser, that indorser will stand in the same predicament as if he were the drawer of the bill, and the omission to make a due presentment will be excused as to him, although not as to the other indorsers. (*Chitty on Bills*, 481, 470, 471, 8th Ed.; *Bayley on Bills*, 297, 5th Ed.,) and in *2 Daniel on Negotiable Instruments*, 117, section 1085, it is said: 'If the bill is drawn and accepted or the note made for the accommodation of a particular indorser, that indorser is the real party who should make provision to pay the bill at maturity, and the failure to make a due presentment will be excused as to him, though not as to the other indorsers.'"

Plaintiffs, I suppose, might have framed their declaration so that, under the facts disclosed by them to the learned County Court Judge, the judgment below could not be disturbed. Defendant's plea and affidavit are most unsatisfactory, and framed, evidently, to take advantage of the defect, and though the defendant, by the mode in which he has undertaken to meet the affidavits, can leave little doubt as to the character of his defence, I do not see that we can do anything except to sustain the appeal, leaving the costs of this appeal, with the costs of the rule below, to abide the event of the suit.

THE QUEEN *v.* SHORTIS.

RULE applied for under R. S., c. 112, sec. 13, to compel a Stipendiary Magistrate to make an order for the commitment of defendant under Dominion Act of 1869, c. 20, sec. 25, for not providing necessary food, &c., for his wife, refused on the ground that the Justice, in declining to make the order, had exercised a judicial discretion.

IN this case proceedings had been taken before the Stipendiary Magistrate of the City of Halifax, under the Dominion Act of 1869, chapter 20, section 25, to procure the defendant to be committed for trial for not providing necessary food, etc., for his wife. The Stipendiary Magistrate refused to make an order, deciding that no case had been made out for commitment.

LeNoir, Q. C., (February 25th, 1879,) applied to the Court, under Revised Statutes, chapter 112, section 13, for a rule to compel the Justice to make the order.

Eaton, contra, was not called upon.

SIR WILLIAM YOUNG, C. J., now, (March 1st, 1879,) delivered the judgment of the Court, orally, to the effect that as the Stipendiary Magistrate, in refusing to make the order, had exercised a judicial discretion, the provisions of section 13 of chapter 112 Revised Statutes, did not apply, and the Court could not make the order asked for.

McDONALD *v.* FERGUSSON.

To an action of trover against the defendant, as Sheriff, for goods seized under execution, defendant pleaded, attacking a transfer from the execution debtor to the plaintiff, his father-in-law, as fraudulent. The transfer was by bill of sale made on the day on which the summons in the cause in which the execution was afterwards issued was served on the debtor. It was made without the knowledge or consent of the plaintiff, in the absence of any person representing him, and the consideration was a debt alleged to have been incurred nine years before for board to the debtor's wife and children, and sundry articles and services such as a father might naturally contribute to his daughter's comfort without expectation of payment.

Held, that the verdict establishing fraud in the transfer could not be set aside as against evidence.

Defendant put in as evidence of the judgment the so-called "record by default" in the form No. 11 of schedule A, cap. 94, R. S., signed by the plaintiff's attorney.

Held, that this was legal evidence of a judgment.

THIS was an action of trover against the Sheriff of Cape Breton for goods taken under an execution against one McLay, a son-in-law of the plaintiff. Plaintiff claimed the goods under

a transfer from McLay, which the defendant, in one of his pleas, attacked as fraudulent. The jury found a verdict for the defendant, and a rule *nisi* to set the verdict aside as against evidence was argued this Term before DESBARRES, MCDONALD SMITH and JAMES, JJ.

Graham, in support of rule.—It is necessary for the defendant to prove his pleas. There is not a single badge of fraud. The conveyance being to a relative is not a badge of fraud. The whole defence rests on a justification under a judgment and execution. There is no evidence of a judgment here at all;—there is no proper record. The document treated as a record does not set out the counts. It is merely a paper in the form Schedule A., No. 11, prescribed by section 68 of the Practice Act. The statute does not call that a record. In England the writ is issued without a declaration at all. If the party appears, then the declaration is served. If there is a default there is no declaration at all. This paper does not give the cause of action. (DESBARRES, J.—It gives more than the recital of the cause of action would give. It states the particulars.) The record must set out the pleadings. The form prescribed by the statute has to be signed. This is not signed. It is simply a judgment, not a record. As to the execution see chapter 94, sections 265 and 266 Revised Statutes. In *Gavaza* v. *Black*, 3 R. & C., 129, decided by this Court last Term, the execution was a mere dunning execution. In *Ramsey* v. *Reid*, appealed from P. E. Island to the Supreme Court of Canada, the local statute required a præcipe to be filed before the issue of an execution. (DESBARRES, J.—The indorsement has been in use many years; it arose from the habit of Sheriffs returning "no goods," and not arresting the defendant. It is the writ itself, and not the written instructions, that justify the Sheriff in proceeding.) There is no evidence that the bill of costs was filed before the issue of this execution. (The COURT.—We assume that, as you have no plea denying it.) Cites *Bump on Fraudulent Conveyances*, 186, and *7 Taunt.*, 149. The bill of sale is delivered by filing.

Eaton, contra.—The whole question here is whether or not the bill of sale is fraudulent, or rather whether there is such an absence of evidence of fraud as to upset the verdict of fraud.

(McDONALD, J.—No; the Sheriff must prove his whole claim to the goods, the judgment, record and execution.) The evidence contains *indicia* of fraud. Cites *Benjamin on Sales*, 390-3. As to the record here, the default is the real judgment; the record is the evidence of the judgment. The plaintiffs have no replication denying the record of the judgment under which we defend. The record here is in the form prescribed by the statute, (schedule to chapter 94 Revised Statutes.) There is no necessity for the indorsement of a memorandum on the execution containing specific directions to the Sheriff.

Graham, in reply.—This paper, (the record, so-called,) is insufficient, because the statute itself has not been complied with. The statute requires that it should be signed. The way it comes about is that in England they have no docket of judgment, and this is what they have there instead.

JAMES, J., now, (March 10th, 1879,) delivered the judgment of the Court:—

This is an action of trover against the Sheriff of Cape Breton County for two horses and other personal property, claimed by the plaintiff, which were sold by him under execution against one Robert McLay, the son-in-law of the plaintiff. The defendant justified under a judgment obtained by one Hector McDonald against McLay, alleging the goods to be the goods of McLay, and in another plea charged that they had been fraudulently assigneed by McLay to the plaintiff. The learned Judge, in charging the jury, left the whole question open to them upon the facts, and they found a verdict for the defendant. The case comes before us on a rule *nisi* for a new trial on the ground that it is against the evidence. It is unnecessary to review the facts fully, as I am satisfied from the evidence that the jury had quite sufficient to justify them in finding that the assignment was fraudulent. The alleged debt from McLay to the plaintiff was incurred nine or ten years before the bill of sale was given. It was for board to McLay's wife and children, a cow, a few bushels of potatoes, and some services; the whole of which were of such a character as a man in comfortable circumstances might naturally have been expected to contribute to the comfort of his daughter and her family without any intention of making a charge therefor;

and the bill of sale was executed by McLay on the day the writ of summons on which the judgment was entered was served on him at Sydney, some twenty or thirty miles from the plaintiff's residence, in the absence of any person representing him, and, as appears by his own evidence, without his knowledge or consent. It does not appear ever to have been delivered to him personally. These and other indications of fraud are quite sufficient to sustain the verdict, notwithstanding some evidence on the other side which the jury, who were better qualified than we can be to judge of the credibility of the witnesses, had a perfect right to disbelieve, as they probably did.

I should not have thought it necessary to write an opinion on this rule *nisi* had it not been for a contention of counsel for the plaintiff that the defendant had failed in his proof of the judgment against McLay, owing to a formal defect in the record put in evidence. This paper is that authorized by section 68 of the Practice Act, and the form is given in schedule A, No. 11, page 510. It was given in evidence as the record in the cause, signed by the plaintiff's attorney. Whatever may have been the intention of the Legislature in authorizing plaintiff to "sign final judgment" in this form, there is no doubt that ever since this clause was originally inserted in the Practice Act, at least twenty years ago,—for we find it in the second series of the Revised Statutes,—it has been treated by the legal profession, in their ordinary practice, as authorizing a cheap and convenient form of record; and if we were to come now to a contrary conclusion we would invalidate numerous sales of real and personal property effected under executions based on records exactly similar to this. This consideration should make us very careful not to adopt a contrary construction of the clause except upon the strongest and clearest grounds. But, apart from this consideration, I have no doubt that such was the intention of the Legislature. We must suppose that it was intended to effect some good purpose, and I can conceive of no other purpose it could serve except to promote convenience and save expense to suitors. These objects it effectually accomplished, and for any other purpose the enactment is useless. That the statute should call the paper a "judgment" instead of a "record" which is

the legal evidence of a judgment, when a record was intended, is far more probable than that the Legislature should have inserted in the Statute-book a wholly useless clause. The practice of treating this form as a form of record having existed so long without being questioned and without any evil results; a contrary construction of the statute being pregnant with so great evils, and no argument being adduced to us to shew what other rational meaning could be put upon the statute, I am satisfied that the record proved in this case is sufficient. The rule *nisi* will be discharged with costs.

CUTLIP ET AL. *v.* CALDWELL.

In an action against a Sheriff for releasing a debtor imprisoned under process out of the county Court, an order having been made for his discharge by Commissioners for the Relief of Insolvent Debtors, the County Court decided in favor of the plaintiffs on the ground that previous to April 4th, 1878, such commissioners had no power to relieve in the case of executions out of the County Court. After the argument of the appeal from this decision, and before judgment, the Act of 1878 "for the Relief of debtors imprisoned under process issued out of the County Court," was passed, one clause of which provided that no action should be taken *or sustained* by reason of such proceedings being void, (*i. e.*, proceedings before the Commissioners taken previous to this Act).

Held, that this Act was retrospective and the action could not be sustained, but that the judgment for defendant should be without costs, as the action had been rightly brought in the first instance.

The Court refused to grant a re-argument applied for on the grounds that the Act of 1878 was *ultra vires* and that it could not be construed retrospectively.

THIS cause came before the County Court, at Halifax on the following case stated for the opinion of the Court:

"In this case the plaintiffs recovered judgment against one Thomas R. DeWolf, in the County Court, on the 5th day of May, 1877, for $42.77 debt and costs, and execution was duly issued on the same day, directed to the Sheriff of the County of King's, endorsed as follows:—

"MR. SHERIFF,—Please levy on the personal property of the within-named defendant for the within amount, with interest, together with your own fees, and in default thereof take the body.

Yours, &c.,

WILLIAM F. McCOY,
Plaintiffs' Attorney.

"On the 28th day of June, 1877, the defendant, as such Sheriff, by virtue of his instructions under the above execution, arrested the said Thomas R. DeWolf, and committed him to jail in Kentville. Soon after an application was made to two Commissioners for giving relief to Insolvent Debtors for his (DeWolf's) discharge, under chapter 137 of the Revised Statutes. As soon as the order was served calling upon the plaintiffs to appear at Kentville on a certain day to shew cause why the said Thomas R. DeWolf should not be discharged, their attorney, William F. McCoy, gave notice in writing, copy of which is annexed, to the defendant in this cause, forbidding him to release the said DeWolf upon the order of the said Commissioners, alleging that they had no power to grant such an order. The Commissioners were notified to the same effect, by letter annexed. The defendant duly received said notice before said discharge. On the 29th day of June, 1877, the two Commissioners above-mentioned, viz., Edward A. Pyke and Winckworth Chipman, made an order on the petition of Thomas R. DeWolf, copies of which order and petition are hereto annexed. This order was duly served on plaintiffs' attorney, who accepted service thereof on the 30th, and no one appearing at the time and place appointed, the said two Commissioners made the final order, a copy of which is annexed. A copy of the commission under which they acted is also annexed. On the 6th day of July, 1877, the defendant, as aforesaid, discharged the said Thomas R. DeWolf from his custody, upon the order of said Commissioners, and made return on said execution to that effect.

The questions in this case are: Had the Commissioners power, under the statute, to release a debtor imprisoned under an execution issued out of the County Court, and had the Sheriff any right to obey such order, especially after due notice? If the Sheriff had a right to discharge the said DeWolf under said order, then judgment to be entered for the defendant for costs. If the Sheriff was not justified in discharging DeWolf, the question remains what amount are the plaintiffs entitled to recover, whether nominal damages only or the amount of their judgment against DeWolf,—$42.77? The Commissioners were indemnified by DeWolf, but the Sheriff is not indemnified."

After argument before JOHNSTONE, J., of the County Court, his Lordship delivered the following judgment:—

Thomas R. DeWolf was arrested and incarcerated under an execution issued out of the County Court. He petitioned two Commissioners for his discharge, who made an order for his discharge, neither the plaintiffs nor their attorney attending, but through their attorney notifying the Commissioners that they had no power to act in the premises, and that they would be held responsible if they ordered the discharge of the debtor. On the order made by the Commissioners the Sheriff, notwithstanding notice from the plaintiffs' attorney, allowed the debtor to go.

On this three questions for adjudication were made. 1. Had the Commissioners power under the statute to release a debtor imprisoned under an execution issuing out of the County Court? 2. Had the Sheriff any right to obey such order, especially after the notice? 3. If the Sheriff was not justified in discharging DeWolf, are the plaintiffs entitled to nominal damages only, or to the amount of their judgment?

To the first question; Section 2, chapter 137, for the relief of insolvent debtors, gives the Commissioners power only in respect of judgments issuing out of the Supreme Court, and that Act does, in my opinion, give them no power to act, except in respect of parties imprisoned under judgments out of such Court. But it is said that the County Court Act confers on them the necessary authority to act in the premises, and sections 26 and 21 of the County Court Act of 1874, chapter 18, were cited as conferring that jurisdiction. Section 26 connot be construed to have that effect. It is very questionable whether it does more than give the County Court Judges concurrent jurisdiction with the Judges of the Supreme Court in cases under chapter 137. The clause of section 21 relied on is "every Act relating to any other matter or thing whatever connected with the administration of justice in the Supreme Court shall apply to the County Court when not inconsistent with the County Court Act;" but I do not think that this clause confers the power claimed, for, in the first place, relieving insolvent debtors does not pertain to the administration of justice, but it is rather to be held an act for ameliorating the

rigor of the common law, and the words that confer such jurisdiction upon the Commissioners ought to be clear and without doubt. In *Price* v. *Hopper*, 1 Stra., 260, FORTESQUE, J., says that an inferior Court is not to be construed into jurisdiction, and KEATING, J., in *James* v. *S. C. R. Co.*, L. R., 7 Ex., 296, observes that words conferring jurisdiction should be clear and unambiguous. I therefore find that the Commissioners had no power to order the release of a debtor confined under process out of the County Court.

To the second question; I am of opinion that the Sheriff obeyed the order at his peril, the order of the Commissioners being *ultra vires*.

To the third question; I think that this is a voluntary escape, and a voluntary escape cannot be justified. The Sheriff suffered his debtor to escape, by mistake it may be, but still he suffered it, and he is therefore chargeable with the whole debt; and, the escape being against the will of him who arrested the debtor, as to him it must be held to be a negligent escape, (*Impey's Sheriff*, 202,) and, after the notice, a gross negligence. The creditor had a right to the body of his debtor, the highest security know to the law, until his debt was paid or the debtor was released by process of law, and this I hold he was not. No proof was adduced before me of the inability of DeWolf to pay, other than that furnished in the schedule attached to his insolvent papers, or that there was not a margin on the real estate, after paying the mortgage, sufficient to pay this claim, and no assignment as required by the statute seems to have been made. I must, therefore, find for the plaintiffs the amount of the debt for which DeWolf was incarcerated, $38.67.

An appeal was allowed from this decision, which was entered for argument last Term, and argued March 20th, 1878, before SIR WILLIAM YOUNG, C. J., MCDONALD, SMITH and JAMES, JJ.

Thompson, in support of appeal.—The first section of chapter 137 Revised Statutes is the foundation of the appointment of the Commissioners for giving relief to insolvent debtors. It is as substantial a provision as if it were a separate Act. The commission issued under that section. The only debtors to which their power of relief would apply, until the Act of 1874

came into force, were debtors imprisoned under process issued out of the Supreme Court. When the Act of 1874 came into force, a new class of debtors, imprisoned under process issued out of the County Court, came into existence, and the jurisdiction of the Commissioners at once extended to them. Section 21 of the County Court Act of 1874 is sufficiently extensive to cover proceedings under chapter 137, as well as under the Practice Act. Section 26 of the County Court Act expressly gives the Judge of the County Court himself jurisdiction under chapter 137 Revised Statutes.

Now, supposing the release of the debtor not justifiable, the question of damages arises. That question is settled by the Revised Statutes, chapter 17, section 11, which enacts that unless the Sheriff connives at the escape, or is guilty of gross negligence, only nominal damages shall be recovered, and that the damages shall not exceed the original judgment against the debtor in any case. The Sheriff cannot be said to have connived at the escape, nor to have been guilty of gross negligence. The Judge was wrong in intimating that there was no assignment from the debtor. The case does not say that, and the presumption is that there was. *Fisher's Dig.*, 3514.

McCoy, Q. C.—The first ground we take is that there is no appeal where there is a special case, under the County Court Act. Another reason to prevent an appeal here is that the judgment is for less than $40, being for $38.57. The argument that the Act, (chapter 137, Revised Statutes,) gives the Commissioners jurisdiction to afford relief to insolvent debtors imprisoned on executions out of the County Court is clearly bad, because otherwise there would be no limit to their authority. Section 1 of that chapter only gives an authority to the Governor-in-Council to appoint Commissioners, but does not define their jurisdiction, which is defined in the following sections. The common law gave the creditor a right to the body of his debtor; that right can only be taken away by express enactment. The question here is not whether the Judges of the County Court have authority to discharge, but whether Commissioners have the authority. If the Court think that section 26 of the County Court Act gives authority

the Commissioners, but it enacts that "no action in any Court shall hereafter be taken or *sustained* by reason of any such proceedings being illegal or void." The Act having this retrospective effect, and precluding this Court from *sustaining* any action brought, we have no alternative but to give judgment for defendant; but as I am of opinion that previous to the passage of the Act referred to Commissioners had no such power as contented for, and that the action was in law rightly brought, it must be without costs.

On motion day, (February 22nd, 1879,) *McCoy, Q. C.*, moved for a re-argument of the cause to open and correct the judgment on the ground that the Act of April 4th, 1878 was *ultra vires*, and that it could not be construed retrospectively, citing *The Queen* v. *Chandler*, 1 Hannay's N. B. Reps., 548.

McDONALD, J.—The question of insolvency does not arise in this case. It is only a question as to the right of the Legislature to indemnify the Sheriff.

McCoy, Q. C.—The effect of the statute of 1878 was never argued.

SIR WILLIAM YOUNG, C. J., now, (March 10th, 1879,) delivered the judgment of the Court, declining to grant a rule for a re-argument.

McLELLAN *v.* McLELLAN.

AN action was brought against the heir of an obligor on a bond whereby he bound himself and his heirs for the maintenance, among others, of the plaintiff.

Held, that the common law principle under which the heir, having assets from his ancestor, could be made liable on such a bond, was entirely inapplicable to the position in which the statute of distributions placed him in this province; that the bond, although naming the heir, was not a charge on real estate, and that the action could not be sustained.

THIS was an action on a bond for maintenance, whereby Alexander McLellan, Jr., bound himself and his heirs to maintain Janet and Margaret McLellan, his sisters. The original obligor died, leaving his wife Margaret and an infant son surviving. The son died in infancy, and the action was brought against the widow of the obligor as his heir, by the plaintiff,

one of the sisters of Alexander McLellan, Jr. The cause was tried at Truro before JAMES, J., when a verdict was found for the plaintiff for ten dollars. The rule to set aside this verdict was argued before SIR WILLIAM YOUNG, C. J., DESBARRES, SMITH and JAMES, JJ.

Ross, for rule to set aside verdict.—This instrument, (the bond,) was received in evidence without proper proof of the loss of the original. They proved the loss of a bond in Marshall's hand, but they did not connect the original of this instrument with the one of which the loss is proved. The strictness of the proof of the loss is in proportion to the importance of the document. Here it is the ground of the whole suit. This instrument is not proven to have been a copy of the original. The w[illegible]r does not say it was ever compared, and he says he knows it is a copy of the original because it is in his handwriting. He says that is his only reason for saying so. The suit is brought against the heir of the heir. That cannot be done. The obligor binds himself to the obligees jointly and severally. Now obligors may bind themselves jointly and severally but the obligees cannot take a right jointly and severally. *Pugh* v. *Stringfield et al.*, 3 C. B. N. S.; *Pugh et al.* v. *Stringfield*, 4 C. B. N. S., 367. Either the word "joint" or the word "several" is inoperative. If it is a joint bond, the plaintiff should show that all the parties have been joined. She was jointly interested with her sister.

Johnston, Q. C., contra.—The action against the heir, or the heir of the heir has been recognized from Coke down to Dicey. The only question is whether the heir has taken assets, and that is a question of fact. (YOUNG, C. J.—It is not so clear as to the action against the heir of the heir.) See *1 Chitty on Pl.*, 60; *2 Saunders*, 136, 137; *Plowden*. 438, 439; *2 Blackstone's Com.*, (Lib. Ed.,) 243; *Willes R.*, 585; *3 Ad. & El.*, 839; *3 Chitty on Pl.*, 332; *2 Saunders*, 7; *Dicey on Parties*, 344; *Roscoe's N. P.*, 1207.

Henry, in reply, refers to Probate Act, section 70 especially. The real and personal estate are distributed. The only things excepted are judgments and mortgages. *Expressio unius exclusio alterius.* (JAMES, J.—Cannot the common law apply and put you to your plea that there had been administration

or that the estate was liable to debts?) Even if no administration has actually taken place the law provides machinery inconsistent with the course adopted here, *i. e.*, of action against the heir.

Johnstone, Q. C.—There was in this case no administration and no debts proved.

Henry.—A right to sue on an executory contract like this could not follow and continue as long as the land exists. See *Murdoch's Epitome*, B. 3, chap. 5, p. 115.

SMITH, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This action was tried before Mr. Justice JAMES, at Truro, during the last sittings of the Supreme Court, and a verdict was given for the plaintiff for $10. A rule to set aside the verdict was obtained, and was argued before us this Term.

It appears that in the month of November, 1850, Alexander McLellan, Sr., and his wife conveyed to their son, Alexander McLellan, Jr., certain real estate in fee simple, taking from him a bond of contemporaneous date, conditioned, among other things, for the maintenance, in the manner therein prescribed, of Janet and Margaret McLellan, the daughters of the grantor. Alexander McLellan, Sr., and his wife died, and subsequently Alexander McLellan, Jr., died, leaving his wife Margaret, the present defendant, and an infant son him surviving. There is no evidence of any will. The son then died in infancy, and the defendant took the property as his heir. The plaintiff, Margaret McLellan, one of the sisters of Alexander McLellan named in the bond, sued the defendant as such heir for a breach of the condition of the bond.

It will be unnecessary to refer to the evidence as sustaining the breach or to the several points taken at the argument by defendant's counsel, except to remark that, but for a difficulty which occurs to the Court as insuperable in the way of the plaintiff, they would hesitate before disturbing the verdict. The question which strikes at the foundation of the plaintiff's case is, can such a suit be brought against an heir in this country? Undoubtedly it could in England, and I have had no difficulty in finding law to this effect and forms in books of pleading based upon it. These probably have misled the

plaintiff's attorney. Without question an heir may be sued in England on contracts of the deceased in three cases, viz.: 1. On contracts by deed, in which the ancestor expressly binds himself and his heirs. 2. On contracts of record. 3. On covenants real; but only so far as he has legal assets from his ancestor. But this common law principle is entirely inapplicable to the altered situation in which our statute of distributions has placed him. The possession of the real assets and their disposal for the purpose of liquidating debts has been transferred from the heir to the executors and administrators, under the direction of the Courts of Probate. A bond under our law, as held by this Court, is *not a charge* upon the real estate in Nova Scotia, although naming the heir, and the principle upon which the common law obligation rests, and which imposes the liability on the heir, is wanting in this country. In England the heir is the only representative of the deceased as to his lands. In this Province the executors and administrators not only represent personally the deceased, but represent him equally in reference to the fulfilment of all obligations charged upon his real estate. To hold otherwise would be to violate both the letter and the spirit of cap. 90 of the Revised Statutes, 4th Series, by which the distribution and manner of dealing with the estates of deceased parties are regulated. In this Act there is no recognition of any charge upon land of deceased as being preferential, except as to "debts due on mortgages of real estate and on judgments registered in the lifetime of the deceased," and it particularly provides that this charge shall only extend so far as the value of the lands so mortgaged or bound by such judgment, leaving the mortgagee or judgment creditor to claim as others after the value of such property shall have been realized. A similar principle seems to prevail in the United States. In volume 1 of *Greenleaf's Cruise on Real Property*. 64, n. 1, the author says; "In the United States the rule is that lands are liable for the debts of the owner, whether due by matter of record, by specialty, or by simple contract. The heir or devisee has no right, except that of possession, until the creditors shall be paid. The ordinary mode of reaching the lands of a deceased person is through the executor or administrator, who is empowered by the proper Court, on deficiency of personal assets, to sell so much of the

real estate as may be necessary to discharge the remaining debts." That the liability of the heir at common law only exists where the debt sought to be recovered is a charge upon the land, is beyond question, and the only authority cited in *Bullen & Leake* by Mr. Johnston most distinctly shews it. At page 145 n. *a.*, it is stated: "At common law an important distinction was made between specialty debts in which the obligor bound himself only, and those in which he also bound his heir by name. The former did not charge the lands of the ancestor which passed by descent to the heir; the latter did, and the obligee could recover upon them against the heir to the extent of the lands acquired by descent from the obligor."

If at common law a bond which does not charge the land does not bind the heir, how can this action be sustained? I am decidedly of opinion that it cannot, and the rule to set aside the verdict must be made absolute with costs.

DEWAR *v.* MURPHY.

SECTION 34, read in connection with section 25, in the Act to amend the Act to establish County Courts, (1877, c. 6,) repeals the provision of section 53 of the County Court Act of 1874, c. 18, allowing an appeal from the decision of the Judge upon a question of fact.

THIS was an appeal from the County Court, District No. 1. The action was brought to recover damages for personal injuries to plaintiff and fatal injuries to plaintiff's horse from a collision caused by alleged unskilful and negligent driving of defendant's horse and sleigh. Pleas, denying property of plaintiff in the horse injured, denying negligence, etc., on the part of defendant, and alleging contributory negligence on the part of plaintiff. The cause was tried before JOHNSTONE, J., of the County Court, who gave judgment in favor of the defendant. Plaintiff appealed from this decision, and the argument of the appeal took place before DESBARRES, MCDONALD, SMITH, and JAMES, JJ.

Ritchie, Q. C., in support of appeal.—It is in evidence that the collision occurred a little south of the corner, or at the corner; that the defendant's horse and sleigh were out of their

proper course, and that the left shaft of defendant's sleigh struck plaintiff's horse fairly in the chest. Defendant's team was coming east down the south side of Cogswell Street, on the wrong side, and plaintiff's team was going north on Brunswick Street on the west side, the proper side. In *3 C. & P.*, 554, the law as to rule of the road and deviations from it, is laid down. The same case is cited in *Oliphant on Horses*. When the meeting is sudden and unexpected, and so likely to cause confusion in the minds of the drivers, the party on the wrong side of the street is liable. Plaintiff has five witnesses, who say that defendant passed on the wrong side, which is consistent with the fact of the left shaft striking the breast of the plaintiff's horse. See Revised Statutes, chapter 48, sec. 13; *Wrongs and Rights of a Traveller*, 138.

Motton, Q. C., contra.—The Judge below has found the facts here, and his finding is conclusive. The question of contributory negligence is one for a jury, and the Judge of the County Court acts as a jury. He has found contributory negligence here on the part of plaintiff. The principles affecting contributory negligence are clearly laid down in the judgment of SMITH, J., in *Conlon* v. *Connolly*, 1 R. & C., 95. The evidence shews that there was a beaten track on the south side of Cogswell Street, which compelled defendant to keep to his right coming down, and to turn into Brunswick Street sharply. The plaintiff's own testimony shews that he saw that collision was inevitable if both parties continued, and that he did not turn either to right or left. There is no attempt to prove any negligence or unskilfulness on the part of defendant, except his being on the wrong side of the street. The Judge below, sitting as a jury, was influenced by the bearing of the various witnesses in the box. The plaintiff was about to make a sharp turn into Cogswell Street, which was not prudent. The plaintiff, when pressed by me on cross-examination, said he might have seen defendant before defendant reached the corner. There is evidence that plaintiff's horse was prancing, and one witness, Ainsley, who owned the horse, says that if the horse was prancing he was badly driven. The burden of proof rests upon the party charging negligence; *4 C. B.*, 693; *8 C. & P.*, 103; *1 Starkie*, 403; *Sherman & Redfield*, 305; *8 C. B. N. S.*, 568; *11 C. B. N. S.*, 588; *L. R.*, *4 C. P.*, 631; *2 D. & R.*,

253. We have the uncontradicted evidence of defendant and of one other witness that plaintff might have avoided the collision. I have understood that this Court has decided that judgments of the County Court cannot be reviwed on questions of fact.

Ritchie, Q. C., in reply.—The 53rd section of the County Court Act, chapter 18 of the Nova Scotia Acts of 1874, fully covers this case. That section is not repealed by subsequent Acts; the right of appeal once given by statute cannot be taken away, except by express enactment. Here the Judge has given an appeal on the law and the evidence. The onus is on the defendant to show that he exercised extraordinary care, being originally on the wrong side of the road, to avoid the collision. He has not done so. There is no evidence of contributory negligence on the part of plaintiff. The time was too short for plaintiff to turn. The plaintiff was right in keeping as close as he did to the left, when about to turn that corner, having a right to expect others coming down the other street to be in the middle.

SMITH, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This is an action brought in the County Court, at Halifax, to recover damages from the defendant for having, as is alleged, so negligently driven his horse on the public highway in the city as to have collided with the horse and sleigh of the plaintiff causing the death of the horse. The defence set up was contributory negligence. The learned County Court Judge, after hearing a good deal of testimony on both sides, gave judgment for the defendant. An appeal from said judgment was taken out and it was argued before us during the present Term. I need not express an opinion, in view of the evidence submitted to us, as to whether this Court would have concurred in the decision of the Court below, because we are all agreed in thinking that, as the law now stands, we cannot review the case upon the facts. It is not necessary to go the length of the decision in *McCabe* v. *McKay*, 3 R. & C., 83, but, where a trial has been had in the County Court there appears to be no doubt, on a careful perusal of the statutes, that an appeal does not lie upon the facts. There may be differences of opinion as to the wisdom of the legislation which creates this difficulty,

but while it so exists we must be governed by it. The 53rd section of the Act of 1874 gives an appeal from the decision of the Judge upon any point of law *or fact*, or the finding of the jury on any fact left to them, or the decision upon motion for a nonsuit, or in arrest of judgment. The 25th section of the Act of 1877 gives an appeal to the party dissatisfied with the decision of the Judge "upon any point of law, or with the charge to the jury where any fact or facts is or are left to them, or with the decision upon motion for a nonsuit, or in arrest of judgment." This clause, in terms, gives no appeal from the decision of *the Judge* on the facts. The 34th section repeals "all Acts, or parts of Acts inconsistent with this Act." The application of the appeal to cases *tried* before the Judge in the Act of 1877 seems to render the section inconsistent with that in the Act of 1874. Section 14 of the Act of 1878 confers a discretionary power upon the Judge, notwithstanding the 25th, 26th and 29th sections of the Act of 1877, to allow appeals, but only upon *any point of law or practice.*

By this construction of the statutes, which I consider unavoidable, there remains nothing for us but to dismiss the appeal with costs.

MERCHANTS' BANK *v.* SPINNEY ET AL.

PLAINTIFFS brought action against defendants as endorsers of a foreign bill of exchange due February 12th, 1877. The Notary who protested the bill gave evidence that he demanded payment and protested it on the 12th. He denied that he had received it before that date, and declared that he was not at the drawees' place of business on the 12th; but the note on the bill, "February 13th," had originally been written February 12th. A protest was put in proof, dated February 13th, without the Notary's seal of office, and also a protest dated February 12th, having the seal affixed. The latter had been sent with the bill to the plaintiffs, and their attorney then corresponded with the Notary, whose explanation led him to suppose that a clerical error had been made, whereupon he enclosed to the Notary the protest of February 13th, with the draft attached, and the Notary afterwards returned the new protest amended, dated February 13th, and the old protest of February 12th. The Notary, in his evidence, said nothing of this correspondence, and failed to explain the erasure of "12th," above referred to. Plaintiffs, on the trial, before a Judge without a jury, accepted a nonsuit, with leave to move, and the Court, after argument, discharged the rule for a new trial, holding that the evidence of the Notary being unreliable, proof of a due presentment had failed, and, further, that the protest of February 13th was defective for want of a seal.

THIS was an action against the first indorsers (the payees) of a foreign bill of exchange. The defence relied on was want of presentation and protest. The cause was tried at Digby before the learned Judge in Equity. The bill was due on

the 13th day of February, 1877, and annexed to it were two protests, one dated the 12th day of February, and the other dated the 13th. The reception of the second protest was objected to on the ground that it bore no seal. The making and indorsement of the bill were admitted. The plaintiffs accepted a nonsuit, with leave to move for a rule to set the nonsuit aside. This rule was argued December 18th, 1878, before YOUNG, C. J., SMITH, JAMES and WEATHERBE, JJ.

Harrington, in support of rule.—The notary, having noted his protest on the day of presentment, can extend it at any time. The protest being merely *prima facie* evidence of the presentment, etc., it can be corrected according to the facts. The notary's protest is sealed. It shews upon its face a monogram with the notary's initials. In the corner of the protest is a monogram, apparently printed at the time the protest form was printed. The document purports to be under seal, and the presumption is that it has been sealed. *7 Q. B.*, 232; *26 U. C., Q. B.*, 539; *Taylor on Evidence*, section 128. The notice is sufficient. It alleges that the bill was dishonored, and that there were damages. *L. R., 9 Ch. Ap.*, 591; *4 A. & E.*, 870. The mention of damages shews that the expense of protesting had been incurred. If there is anything in the notice to put the party on his guard, by shewing that the necessary legal steps had been taken it is enough; *Byles on Bills*, 275, and cases there cited. See also *12 Mass. Reps.*, 6.

Bingay, contra.—No protest of the 13th February has been proved at all. A notary is required to act under his seal of office. Our Legislature considered it necessary to mention that acknowledgments of dower, etc., before a notary should be sufficient without his seal of office. It cannot be contended here that this ornamental monogram was put on the document on the 13th of February, or was placed there with the intention on the part of the notary of making it his seal. Even admitting that the document of the 13th is sealed, it is not a protest such as the law requires. *4 Howard U. S. Rep.*, 362. The protest must be according to the law of the country where made. It is laid down in the case above cited, and in *3 Kent's Com.*, that in the United States the protest of a foreign bill must state that the bill was presented.

That there is no pretence of a clerical error is shown by the evidence. The notary, when asked the last time he saw the bill, said the 13th or 14th of February, 1877, while another witness for plaintiff states that the bill was in the notary's hands three or four months afterwards, when he prepared the second protest. *Thomson, N. S. R.*, 401, shews that each indorser is entitled to notice of the protest. The notice follows the law of the country where it is given. The case in *Thomson* has not been overruled, and is up to this momont the law of this Province. *2 Esp.*, 511; *4 Esp.*, 48; *1 M: & S.*, 289. The case cited by Mr. Harrington from *L. R. 9 Ch. Ap.*, is on bankruptcy, and there are two holdings in the case, one being that not so strict notice of dishonor is required in bankruptcy as in common law proceedings. Again, in that case the notice mentioned "charges," from which it might be inferred that the bill had been presented; the word "damages" in the notice here does not raise such an inference. The notice of dishonor here does not describe the bill with sufficient particularity; it does not state for what time the bill was drawn. See *10 Mass. R.*, 53; *4 Mass. R.*, 347; *5 Mass. R.*, 169, citing *Bacon's Abridgement*, tit. Merchant; *Story on Bills*, sections 301, 302, 390; *Chitty on Bills*. It was not competent to amend the protest after having acted upon the protest of 12th February and communicated it to the defendants.

Rigby, Q. C. (follows.)—The case in *L. R. 9 Ch. Ap.*, does not sustain the contention of the other side. The only Judge who adverted to the sufficiency of the notice in that case said, immediately afterwards, that the defendant had acknowledged his liability, thus waiving insufficiency of notice. The notice in that case stated that the bill, (a foreign bill,) had been "duly presented for payment and returned dishonored." The notice of dishonor ought to have been sent directly from the principal bank in Halifax, and not delayed till the bill went to the agency at Weymouth. The notice should not have been given by the agency, but by the principal. *L. R. 1 Eq.*, 1. There was unreasonable delay. But whether there was delay to prejudice defendants or not, the case just cited shews that the rule of a day's delay does not extend to allow a day for communication between the holder and his agent. As to necessity for seal, see *Brooke's Office of Notary*, 12. The plaintiffs are

bound by the first protest, having put it in evidence. They might have amended the first protest, but did not do so.

Ritchie, Q. C., in reply.—The protest was not put in as evidence of presentation, but as evidence to rebut a plea of want of protest. It is therefore in a different position from what it otherwise would have occupied. But a protest does not require a seal. *1 U. C. Q. B.*, 424. If a seal is necessary, no particular seal is necessary; *Sugden on Powers*, 232. The question of a seal is for a jury. *2 M. & R.*, 140; *L. R. 6 C. P.*, 411; *Byles on Bills*, 258. In *4 Howard*, 283–5, cited on the other side, the protest was offered as proof of the presentation and it was ruled out because it did not shew either the presence or the exhibition of the bill. As to the notice of dishonor, if the bill were an inland bill there would be no doubt of its sufficiency. The cases cited on page 275 of *Byles* shew that the word, "dishonored," implies presentment, because presentment is as necessary in the one as in the other. The word, "dishonored," therefore includes, "duly presented for payment." The only difference is that the foreign bill requires notice of protest. The words "duly presented for payment," in the case in *L. R. 9 Ch. Ap.*, do not imply the protest. The only words implying notarial protest in that case were the words, "amount of charges;" the word "charges" does not necessarily mean "notarial charges" as commonly used in notices on such bills. Our statute, (Appendix to Revised Statutes, p. 56,) declares that no damages can be recovered on a bill unless it has been protested; therefore the words "damages $27," in the notice here, do import that there had been a protest. The minute that notice was given the defendants sent for the protest. The defendants wrote a letter on the 27th February, asking for a copy of the protest. (*Bingay.*—There was, on the 21st, a telegram asking for a copy of the bill, which proved unsatisfactory.) Cites, as to amending the protest, *17 Howard R.*, 607. We put in first the protest of 12th February, and afterwards admitted that there was a second protest, and produced it.

The point that the notice was too late is met by the case in *12 M. & W.*, 51, which shews that a branch bank is treated as a principal, and that each branch is entitled to be treated as a separate indorser, and to receive notice of dishonor.

Bingay, as to the point that the protest was put in, not as proof of presentment, but of the fact of there having been a protest, cites *Byles on Bills*, 333, 455.

[After the argument of the case, WEATHERBE, J., said he had learned that previous to his appointment he had been retained as counsel in the cause. It was then agreed by the parties that a new argument should be had, *pro forma*, RITCHIE, E. J., taking the place of WEATHERBE, J.]

SIR WILLIAM YOUNG, C. J., now, (March 31st, 1879,) delivered the judgment of the Court:—

The defendants are the first indorsers of the bill of exchange declared on, drawn in their favor by Ladd, Porter & Co., on Ellis & Co., in Boston, at sixty days after sight, for $950, accepted December 12, 1876, and falling due February 10–13, 1877, and as it was dishonored at maturity the question is whether it was duly handled so as to render the defendants liable. The first step was its presentation, when due, to the acceptors, and as it was a foreign bill, the next was its being duly protested. On both points the plaintiff labored under serious difficulties. The Cashier and Notary of the Boston bank, by whom the bill was held, were examined under commission, and the Notary testified that the bill was sent to him from the bank for the purpose of protest on the 13th; that he demanded payment of the drawees, at their place of business, having the draft in his possession, on that day; that he protested the draft on the same day, and on the 14th returned it to the bank. In his cross-examination he denies that he had the draft previous to the 13th. He declares that he was not at the drawees' place of business on the 12th, and that the person in charge of the office told him "the drawers were to arrange it." A protest was then produced in the printed form used by the Notary, dated the 13th, but without the Notary's seal of office. The bill itself was also in proof marked in red ink "P. N. P. Feb. 13, '77," but which was originally written February 12th. Now, there was a previous protest, also in proof, made and signed by the Notary, as of the 12th, having his seal of office, which last protest accompanied the bill when returned to the plaintiffs, and was sent

by them to Mr. Pelton, their Attorney at Yarmouth. He was examined and said that, having noticed that the protest stated the presentation a day too soon, he wrote to the Notary at Boston, asking him to explain, and his reply having led him to think that he (the Notary) had made a clerical error in the protest, the witness enclosed to him the protest of the 12th, with the draft attached, which the Notary returned with a new protest amended, that of the 13th, and the old protest, that of the 12th.

Here are several things to be noted. The Notary was examined in October, and does not say a word of this correspondence and amendment. He alleges no second presentment, but issues the second protest. To this last he does not affix his notarial seal, which in so singular a transaction could hardly have been an oversight, for surely he would have made the amended one right, and he gives no explanation of the erasure in red ink, making the 12th into the 13th on the face of the bill. Had the bill been really presented on the 13th, and the first noting in red ink and the date of the first protest been the result of a mistake, I am inclined to think, from the reason of the thing, and on the authority of *Dennaston* v. *Stewart*, 17 Howard, 607, that the Notary might amend them. But in his evidence his defence should have been put on that footing, and he should have frankly admitted the mistake and the correction. Not having done so, how is it possible to rely on his testimony? The evidence of a due presentment has completely failed, and the plaintiffs cannot succeed in this action, their recourse being on the party committing the wrong.

I have looked also into the point so much insisted on at the argument as to the necessity of a notarial seal on the second protest. In *Goldie* v. *Maxwell*, 1 U. C. Q. B., 424, the late Chief Justice ROBINSON said, in 1841, that he did not find authority for holding that a notarial seal was indispensable to a protest of a foreign bill payable abroad. The protest of the 13th is adorned or marked with a printed flourish surrounding the initials of the Notary's name, C. F. F., and this, it was contended, was to be taken as his seal, and it must be confessed that the authorities which I cite at foot have reduced the sealing of an instrument to a mere idle ceremony. But, notwithstanding these, I am of opinion that the Notary's seal

of office is essential to a protest. It is spoken of as a necessary part of it in *Byles on Bills*, 249, in *Chitty & Hulme on Bills*, 12th American Edition, 655, and cases in the notes in *Brooke's Notary*, 67, and in *Story on Bills*, section 277. "The certified protests of Notaries," says Story, "under their hands and seals of office, are universally admitted in all countries, even in those governed by the Common Law, as veritable documents which prove themselves and are therefore admitted, in all Courts of Justice, as *prima facie* evidence of the facts contained therein." Surely, I should say, acts in a foreign country so accredited, ought to bear upon their face something more than the printed monogram or the impression of the Notary's ruler. "The notarial seal," says *Parsons's Mercantile Law*, 111., "is evidence of the dishonor of a foreign bill;" for which he cites numerous cases.

The objections to the notice of dishonor I need not touch. The two main points I have reviewed must decide the case. It was tried by the Equity Judge while on circuit, without a jury, and on motion he was of opinion that the plaintiffs should become nonsuit, but suggested that the defendants should put in their evidence, and that judgment should be entered for the plaintiffs or defendants as the Court, after argument, should order. To this the defendants consented, but the plaintiffs preferred to accept the nonsuit with leave to move. Had there been a jury it might be urged that the evidence of the Notary, though unsupported, left them something to consider, but that point does not now arise, nor was it taken at the argument, and the rule for a new trial will be discharged and a nonsuit entered, with costs.

[Leading cases as to the necessity and use of seals:—*The Queen* v. *Inhabitants of St. Paul*, 7 Q. B., 234–8, and cases there cited; *Junkin* v. *Davis*, 6 U. C. C. P., 411; *Re Mayer, Deceased*, 24 L. T. R. N. S., 273; *Martin et al.* v. *Barnes et al.*, 1 Oldright, 295, and cases there cited.]

ROSE *v.* BURKE.

On appeal to the County Court from a judgment and conviction by two Magistrates, under the License Laws, the County Court Judge, without trying the cause *de novo*, quashed the conviction, on the ground that it was a conviction simply for violating the License Law, without stating the particular act of violation. An appeal was granted to this Court.

Held, that the judgment below must be affirmed, on the ground that the conviction had rightly been quashed, and further that, the summary jurisdiction being abolished, the decision of the County Court was final.

WEATHERBE, J., dissenting.

THIS was a conviction before two Justices of the Peace for violating the License Laws. The defendant appealed under the statute to the County Court, District No. 7, when TREMAINE, J., of the County Court, quashed the conviction for irregularity, without trying the cause *de novo*. An appeal was granted by the County Court Judge to the Supreme Court, which was argued March 13th, 1879, before SIR W. YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, JJ.

Meagher, for respondent, takes the objection that there is no appeal in this case from the County Court, under the decisions in *Coolen* v. *McLean* and *Cochran* v. *Larcom*. 3 R. & C., 479–80, that the judgment of the County Court on appeals from Magistrates is final. Further, the papers are not properly entitled. The plaintiff is described in the original summons as "John W. Rose, Clerk of the Licenses for the County of Cape Breton, in the District of North Sydney," using his statutable title. In the order for appeal he is described as "John W. Rose, a Clerk of the Licenses." Revised Statutes, chapter 75, section 33, and schedule. (WEATHERBE, J.—Would not the order be good if headed *Rose* v. *Burke*?) No; this order of appeal is the foundation of the jurisdiction of this Court, and the cause is not shewn to be the same as that below.

Graham, in support of appeal, cites Revised Statutes, chap. 94, section 78, to shew that in all cases of appeal the cause must be tried *de novo*. The defendant's remedy, if he wanted to quash the conviction, as was done here, was to take the matter out of the Magistrates' Court by *certiorari*. The County Court Judge was bound to try the cause *de novo*, when appealed to him, and could not quash the conviction except under *certiorari*.

Meagher, contra.—There is nothing here to shew that the County Court Judge did not try the cause *de novo*. The objection to the conviction was taken at the "trial" before the County Court Judge. If the motion to quash the conviction was made before trial, it would have been made on affidavit, and there is no affidavit here. (WEATHERBE, J.—Suppose there was no appeal from this judgment quashing the conviction, could the cause be tried over again?) No, because it was tried once. The conviction below was clearly bad. The jurisdiction of this Court to hear this appeal is clearly taken away. Chapter 9 of the Acts of 1878, section 14, refers to appeals in matters coming before the County Court for original determination. The sections giving the County Court appeals from Magistrates say that the County Court shall dispose of the cause, meaning, of course, finally dispose of it; Acts of 1874, chapter 18, sections 15 and 27; Acts of 1877, chapter 6, section 6; Acts of 1878, chapter 9, section 2. Appeals are only given by statute.

DESBARRES, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This is an appeal by plaintiff from the County Court for District No. 7, to which the defendant appealed from the judgment and conviction of two Magistrates, by whom a fine of $40 was imposed upon defendant for a violation of the License Law, chapter 75, Revised Statutes, 4th Series, of the sale of intoxicating liquors. An objection was taken in the County Court by defendant's counsel to the conviction, on the ground of its not being a conviction for violating the License Law by selling intoxicating liquors without license, but simply a conviction for violating the License Law, without stating the particular act constituting such violation. The Judge below, considering the objection a good one, quashed the conviction without trying the merits of the case, and it was contended on the part of the defendant at the argument that, as there had been no trial in the County Court, there could be no appeal from that Court to this in the present case. Considering that the Judges of the County Court are bound to administer the law as well as to adjudicate upon the facts in all cases before them, there can be no doubt that every Judge has the power of

setting aside all informal processes and proceedings instituted in his Court, or brought before him by appeal, and having this power, the only question is whether it was legally exercised in the case before us.

On reading the summons issued by the Magistrates, and the conviction upon it, it is clear that there is a departure in both from the forms given for their guidance in the License Act, and that the informality in the conviction is of such a character as to render it wholly worthless. Magistrates are not at liberty to make forms for themselves. They must observe the forms which the Legislature has thought fit to make for them, especially in cases in which penalties are imposed. In these an adherence to form is essential, and cannot be dispensed with even in prosecutions for breach of the License Law, which have always been dealt with by this Court with a disposition to carry out, as far as could consistently with the law itself be done, the object and intent of the Legislature in passing this law; never forgetting, however, while adjudicating upon them, to observe the same rules and principles applicable to all other cases that are brought before us. Now there are various acts which may be done or omitted to be done, even by a person holding a license, that are declared to be a violation of the License Law, as well as the sale of intoxicating liquors without license, and therefore every act for which a penalty is sought to be exacted under this law ought to be set out in the summons as well as the conviction, following as nearly as may be the prescribed forms, that the offending party may know the act for which he is sued, and have the opportunity of making his defence thereto, if he has any. In this case the process issued gave the defendant no information whatever of the particular act committed or omitted by him, declared to be a violation of the License Law. He was simply summoned for a violation of the License Law within a week previous to the issuing of the writ and convicted "for violating the License Law, by the evidence of Thomas Hart." In both, the forms prescribed by the Act are entirely disregarded by the Magistrates, there being nothing either on the face of the summons or conviction to shew for what particular offence a fine of $40 was imposed upon the defendant, together with the costs of suit.

I think the Judge was right in quashing the conviction, and that the judgment of the Court below must be affirmed with costs. The summary jurisdiction of this Court having been abolished by chapter 18 of the acts of 1874, we have held that there is now no appeal from the judgment of the County Court to this Court in any case where there has been an appeal to that Court from the decision of Magistrates, and that the decisions of the County Court in all such cases are final.

WEATHERBE, J., delivered the following dissentient opinion:

The point taken on the argument was that the Judge below was wrong, because he did not, as the statute in terms requires in all causes brought up by appeal, *try* the cause. It was contended on the part of defendant that the learned Judge below did try the cause, inasmuch as he heard a motion before the cause was called for trial, and then determined the matter by a final judgment. Can the word, "try," in the statute be construed in that way? It appears a different interpretation is to be arrived at from the authorities cited by me in *Anderson* v. *Taylor*, 3 R. & C. The case here is stronger, for the words are, "the Court shall try the same anew." The difficulty is to see how the judgment below can be sustained where the cause has not been tried anew, but, upon a mere motion to quash the conviction, in the same manner as if the proceedings had been brought up by *certiorari*, the learned Judge below has disposed of the matter, as I understand, on account of a defect in the conviction of the Justices whose decision was appealed from.

Something was said on the argument respecting a defect in the statement of the offence in the summons, and I do not mean to say that, upon a *trial* in the County Court, such defect could not be taken advantage of when evidence was offered, if objected to, or after it was received, on the ground of variance or otherwise, but the Judge below was not asked to decide, and did not decide, on the ground of a defective summons, but solely on the ground of a bad conviction. It was said that there was no appeal to us because the matter was instituted before Justices of the Peace. I saw nothing in the statute thus limiting appeals to us, and no reason whatever was offered for such a construction of the statute.

OAKES *v.* THE CITY OF HALIFAX.

PLAINTIFF brought action against the defendant Corporation for extras in consequence of deviations ordered by the City Engineer from the plan under which plaintiff had contracted to construct a sewer. A reference was entered into signed by the Recorder of the City and the attorney of the plaintiff, and made a rule of Court, whereby the matters in dispute were left to two arbitrators named and a third to be by them chosen, the award to be made on or before the 1st day of May "or on such further or ulterior day as the said arbitrators, on any two of them, shall from time to time endorse on this order." Two extensions were endorsed by two of the arbitrators to the 1st July and the 1st September respectively, and on the 31st August a further extension to the 8th September was endorsed, signed, not by the arbitrators, but by the Recorder and the plaintiff's attorney. In the award, which was made on the 7th of September, the arbitrators set out that they had considered the matters referred to them under the annexed rule "and the endorsements thereon."

Held, on a motion to set aside the award, that the Recorder as the attorney of the Corporation had power to enter into the reference, but, *per* YOUNG, C. J., DESBARRES and MCDONALD, JJ., (WEATHERBE, J., dissenting,) that the last enlargement not having been made by the arbitrators as required by the rule, but by the attorneys of the parties, was invalid, and that the assent of the arbitrators thereto could not give them jurisdiction; *per* YOUNG, C. J. and DESBARRES, J., that there had been no waiver of the irregularity, as nothing was done by the parties in the matter after the 1st of September; *per* MCDONALD, J., that the last enlargement was a void act and could not be waived.

Held, (WEATHERBE, J., dissenting,) that notwithstanding the omission from R. S., Fourth Series, cap. 94, sec. 5, of the words contained in R. S. Third Series, cap. 134, sec. 238, a Judge at Chambers can make a rule *nisi* returnable in Term.

THIS was an action brought for work done and materials provided by the plaintiff for the City of Halifax in the construction of a sewer, the plaintiff claiming for extras in consequence of the alleged departure from the plan and specifications under which the contract was entered into between the parties in the first instance. The claim was, by consent, referred to arbitrators, under the following rule:—

"It is ordered by the Court, by and with the consent of the parties, that all matters in difference in this cause be referred to the award, arbitrament final end and determination of Joseph Norman Ritchie, Q. C., and Benjamin G. Gray, Esquires, Barristers-at-Law, who are appointed as the arbitrators in this cause, and of such third person as the arbitrators may select in case of a difference between them, so as the same arbitrators or any two of them shall make and publish their award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as shall require the same, (or to their respective personal representatives,) on or before the first day of May next ensuing, or on such further or ulterior day as the said arbitrators or any two of them shall from time to time endorse on this order. And it is further ordered that the said parties shall and do perform, fulfil and keep such award so to be made as aforesaid;

and that the costs of this cause, and of the reference and award, or in any matter relative thereto, shall abide the event of such award; and that the said arbitrators or any two of them shall have power to examine the said parties to this suit and their witnesses upon oath or affirmation touching and concerning the matters in difference and dispute between them, and to summon them to attend before them from time to time as often as need shall require, and that, upon due notice being given, if either of the parties shall fail to attend, the arbitrators or any two of them may proceed *ex parte;* and that the said parties do and shall produce before the said arbitrators all books, deeds, papers and writings in their or either of their custody or power touching or relating to the matters in difference. And it is further ordered that in the event of either of the said parties disputing the validity of the said award so to be made and published as aforesaid, or moving to set the same aside, the matters hereby referred or any of them may be remitted to the consideration of the said arbitrators. And it is further ordered that judgment shall be entered upon such award for the amount thereof, and of the costs of suit and reference, in the same manner as if a judgment of the Court had passed in this cause.

Dated at Halifax, this 28th day of December, A. D. 1876.

By the Court,

(Sgd.) M. I. WILKINS,
Prothonotary.

By consent,

(Sgd.) WILLIAM SUTHERLAND,
Attorney of Defendant.

JOHN S. D. THOMPSON,
Attorney of Plaintiff."

The arbitrators proceeded to take evidence and made the following award:—

"We have heard the parties and their witnesses, and fully considered the matters referred to us under the annexed rule made in this cause on the 28th day of December, A. D. 1876, and the endorsements thereon, and we do award and order that the City of Halifax, defendants herein, do pay the plaintiff the sum of five thousand and one dollars and forty-two cents,

($5001.42), in full settlement of all matters in difference in this cause. In making this award we have disallowed an item of $1727 in the defendant's set-off, alleged to have been paid J. B. Neilly & Co., as we considered that it was not a matter of set-off against the plaintiff in this suit or a payment on the contract to a person authorized to receive it.

Fees for 29 meetings, $400.

(Sgd.) B. G. GRAY,
J. N. RITCHIE,
ROBERT SEDGEWICK,
} *Arbitrators.*

Halifax, 7th September, 1877."

A rule *nisi* was granted to set aside this award, twenty-one grounds being taken in the rule, but it is not considered necessary to set out the grounds at length, as those relied upon clearly appear in the argument. A summary of the facts is contained in the judgment of the Court delivered by YOUNG, C. J., (*post* p. 111). The cause was argued January 30th and 31st, 1879, before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and WEATHERBE, JJ.

Meagher, in support of rule.—The rule is not merely to set aside the award, but also to set aside the rule of reference. In connection with that point I take the ground that the Recorder of the city had no authority to refer the cause to arbitrators. He could not agree to the rule of reference, or consent to an arbitration. He is a statutory officer. (MCDONALD, J.—He consents as attorney of the city.) He is a statutory officer and can do dothing beyond the powers conferred upon him, or those necessarily included in them. The powers are defined in the laws and ordinances of the city, page 22, section 101, of the Act of 1864, City Charter. *Dillon on Municipal Corporations*, (Vol. 1, p. 173), lays down that neither the corporation nor its officers can do any act, or exercise any powers not expressly authorized by statute. There is no law whatever, in the City Charter or elsewhere, enabling the Recorder or the City Council to refer a cause to arbitration. The Council has no power to bind its constituents to an arbitration. *Dillon*, vol. 1, pp. 93, 104, note 1, pp. 471, 472. Some very important cases as to the principle that a charter, especially of a municipal corporation, must be strictly

construed, will be found in the American Reports, *23 Pick.*, 171; *13 Mass.*, 277; *3 Wallace*, 320: *12 Wallace*, 349.

It may be urged that the plaintiff has been misled by the officers of the city and should not suffer, but that the city should. On that point, however, it is held by the English, American and Canadian cases that a party dealing with such an officer is bound to know the extent of his authority. See *4 U. C. Q. B.*, 274. There is also an English case of a good deal of importance in *L. R.*, *2 Exch.*, 158. The case shows how strictly, not only the charter of such a body, but also the powers of the officer must be exercised. See *Angell & Ames on Corporations*, 9th Ed., p. 300. Another principle may be well applied to this case, and that is the principle that one of two partners cannot bind his co-partner to a reference, because it is not a power necessary to be exercised in the partnership business. It is no part of the business of the partnership to consent to arbitrations. In a case reported in *6 B. & C.*, 255, an order of reference was made by the Vice-Chancellor, by consent of the attorneys, but the Court held it bad because some of the attorneys were attorneys of infants. See also *3 H. & N.*, 500. The city, if it could refer at all, could not do so except under seal. It must be the corporate act of the body, testified in the usual way by its seal. In *2 C. M. & R.*, 367, the validity of a rate was questioned, and it was held that the church-wardens and overseers had no power to refer a private rate to arbitration by consent, and that a reference so made of a private rate was altogether invalid. See also *Abbot's Digest of Corporations*, p. 508, section 283. In connection with that, note that in every instance of a company having power to refer, it is given by statute. So in *Fisher*, 7323, 7324, referring to the Railway Companies Arbitrations Act, etc. The fact of such legislation raises a strong inference that the power to refer did not exist in the absence of legislation.

The City Charter does not make the City Council the corporation; it is only the representative body. Any power that it exercises must be amply given by the statute organizing that body, and the clauses of the statute giving such powers must be strictly construed. If not given by express legislation the powers claimed to be exercised must be such as it is necessary that the corporation should exercise. Now, was it

necessary that this cause should have been referred to arbitration? Certainly not, because the law provided other tribunals by which the cause could have been tried. The effect of referring the matter to arbitration has been to take away the right of appeal, which the city would have had if the cause had been tried in the usual way. If the City Council had no power to refer the cause, it would be an extraordinary thing to hold that the Recorder, its officer, could do what it could not do itself. (WEATHERBE, J.—He is the attorney on the record. The question is what the Legislature meant when it made the Recorder the attorney of the city.) He is a statutory officer, and can do only what the statute authorizes. I admit that if the city had the power to refer, he, as the attorney of the city, could exercise that power. The attorney cannot exercise for his principal a power that the principal does not possess. In our provincial statutes we have a chapter "of Corporations," which I take it applies only to trading corporations. That statute makes provision as to arbitration, and prescribes the mode. (R. S. cap. 53, sec. 17.) That fact raises an inference that ordinarily corporations should not have power to refer. See also *17 U. C. Q. B.*, 233. (The COURT.—The question is whether the case is different in view of the fact of a suit having been instituted.) If such corporations have no power to refer before a suit, how can they have power after a suit? What is there in the fact of a suit being instituted to enlarge the powers otherwise possessed by them in respect to referring? (WEATHERBE, J.—There is a distinction. They have power to defend suits, and the question is, if in doing so, they are not to do so according to the rules and practice of the courts.) They can only consent to reference if it is necessary. Here it is not, as the ordinary procedure of the Court provides for the trial of the cause. In *17 U. C. Q. B.*, p. 14, it was held that a submission by a trustee did not bind his *cestui que trust*, and as the award was against an indenture under seal, it was set aside. See also *20 U. C. C. P.*, 267, where it was held that the appointment of an arbitrator had to be under the seal of the company. *Dillon*, p. 180, shows that a corporation cannot delegate its powers. The City Laws, p. 17, section 76, of the Charter, provide that the Council shall prescribe the duties of officers by by-laws wherever the Legislature has not

expressly defined them. There are no by-laws defining the duties of the Recorder, and they are expressly defined in the Act. The section last cited shows further that the powers intended to be conferred on the Recorder are simply such as the statute expressly provides for. In *Jennett* v. *Sinclair*, 1 R. & C., 392, there was a resolution of the Council, but the Court held that it was of no effect as there was nothing under seal. Under that authority the consent to reference here could not be made except under seal. (WEATHERBE, J.—Could the Court in this case have ordered a reference under the clauses provided for compulsory reference?) I think that where the city is defendant, the Court should read the statute relating to compulsory reference in the light of the City Charter. As to the necessity of the act being under seal, see *Brice on Ultra Vires*, 750; *Redman on Awards*, 8; *Russell on Arbitration*, 20; *Dillon*, 879. In *Redman*, pp. 16 & 17, a number of statutes were referred to, which provide the machinery for arbitrations. It may be urged that the parties, by allowing the proceedings to go on, have ratified the act of the Recorder. But in order to such ratification knowledge must be brought home, not to the Board of Works or its Chairman, but to the Corporation. No such knowledge is shown here. The ratification would not be sufficient unless under seal.

The absence of certain of the arbitrators during the sittings is fatal to the award. The rule of reference refers the suit to two arbitrators, and a third arbitrator to be selected by them. They selected Mr. Sedgewick before entering upon the arbitration, and he should have been present at the sittings, but was at times absent, as was also Gray, one of the original arbitrators. That irregularity could not be cured by the consent of the parties to go on in the absence of one of the arbitrators. *Russell*, 204. It was essential that all three should be there to constitute the tribunal to which the cause was referred. *1 Hannay*, 469; *12 U. C. Q. B.* 661; *4 Practice Reports*, (Ontario,) 251. Consent cannot give a Court jurisdiction, and should no more be held to give it to a Board of Arbitrators. The principle should be more strictly adhered to in the case of an arbitration than in the case of a Court, as the arbitrators have greater powers and their conclusions are not subject to

review. The Courts do in fact strictly apply the principle that they must all act together. It is not sufficient that they all read the evidence. They had each the right to note the demeanor of the witnesses. In *Eaton* v. *Campbell* in our own Courts, (unreported,) where a question was referred to two arbitrators with power to appoint a third, and the two agreed as to the facts but differed as to the the law, and appointed a third party umpire to whom they referred the legal question, in the absence of the parties to the reference, the award was set aside on that ground. The consent of the parties to go on in the absence of one of the arbitrators does not remove the objection to the want of jurisdiction. *Maxwell on Statutes*, 352.

The award was not made in time. The rule was extended from the 1st of July to the 1st of September. On the 31st of August the attorneys extended the time to the 8th of September by a memo. to this effect; "We extend the time for making the award, under the within rule, to the 8th September, 1877," and the award was made on the 7th September. That memo. was merely an intimation that the parties would agree to the Court, (*i. e.* the arbitrators,) extending the time as they should have done by memo. under their own hands to make the extension valid. Private parties could make a valid extension by such a memo., but that is on the ground that it amounts to a new parol submission. Here, however, the city could not make a parol submission. See *33 U. C. Q. B.*, 331; *31 L. T. R., N. S.*, 722; *8 U. C. Q. B.*, 13; *2 M. & W.*, 69; *Redman*, p. 51; *Russell on Arbitration*, 131, 132. Sutherland had a right to assume that the arbitrators would enlarge the rule by a valid memorandum to that effect, and therefore there can be no knowledge imputed to him of the want of a proper enlargement of the rule, and where there is no knowledge there can be no waiver. *6 H. & N.*, 43. He had no power or authority to bind the city by a memo. for the enlargement of the rule. *Grant on Corporations*, 61.

The arbitrators exceeded the powers conferred upon them. The rule of reference did not cover or include a claim of an entire substitution of other work and in another and different place from that alleged to have been tendered for by the plaintiff, and the arbitrators had no right to hear or deal with

The *Attorney-General*, contra, refers to and comments upon the evidence and plans to refute the contention of the defendant that plaintiff contracted and tendered for a sewer on the east side of Egg Pond. The profile, which is of the utmost importance to contractors as furnishing information of the cost and difficulty of construction, refers unmistakably to the west line and not to the east. It shows a brook crossing, which is on the western line, but is not at all on the east line. Again, the profile refers to Summer Street as being crossed by the sewer, which it would cross if on the western line, but not on the eastern line. So as to another brook indicated on the profile. Mr. Keating himself admitted that an engineer looking at the profile would infer that it was for a sewer on the west and not on the east side of Egg Pond, unless he had explicit information to the contrary. The declaration is framed in the fullest possible way, first on the contract and then on extras and deviations. The contract itself is vague as to the location, but it clearly empowers the engineer in writing to order extras and deviations, which we contended to the satisfaction of the arbitrators had been done in this case. He could make deviations and order extras under the terms of the contract. That which is called a substitution by the defendant is merely a deviation, which the engineer had a right to order and the defendant was bound to pay for. It is a sewer built between the same points across the Common. It is argued that Mr. Oakes should have protested when the plan was shown to him indicating a sewer on the east side. Under the contract he was bound to go on. Had he refused the engineer would have pointed to clause 39 of the contract empowering the engineer to order deviations. He did, as shown in his uncontradicted affidavit, remark that the location had been changed, to which the engineer replied that it would make no difference as the ground was lower. The argument of the defendant assumes that there is no claim in the pleadings for a deviation or substitution and that the arbitrators have allowed for it. We say that there was no substitution but a deviation allowed for, and it was a question of law for the arbitrators to decide whether the deviation that we proved could be given in evidence under the declaration or not. The arbitrators having

admitted the evidence, their decision cannot on that point be reviewed by the Court. *42 U. C. Q. B.*, 390.

Before discussing the question raised as to the power of the City to consent to a reference, I shall refer to the City Laws and Ordinances, those sections constituting the Board of Works and providing for the appointment of a City Engineer. See *City Laws*, p. 76, referring to the constitution of the Board of Works; p. 79, providing for a City Engineer, and pages 92 to 96, referring to the construction of sewers. The Board of Works was the body having full control of the matter, and not the corporation, as appeared to be the case in some of the cases cited for the defendant. All corporations can refer causes to arbitration. Any person who has the power of compromising claims can refer, and some who have no such power, as trustees and executors. *Russell*, 21, states the general proposition. In the case cited there the question was whether the attorney had been validly appointed. Here that question does not arise, as the City Charter makes the Recorder the counsel and attorney of the city. See *6 M. & W.*, 815. *Russell*, 22, shows that when the body corporate properly enters into the arbitration, that is by the proper officer, the award is binding on them. *1 Dillon on Municipal Corporations*, 487, 488, note 2, clearly lays down that the power to refer exists in a municipal corporation, unless it is expressly disabled. See *6 U. C. L. J.*, 207; *19 U. C. Q. B.*, 450; *5 Howard's U. S. Reports*, 83. Mr. Meagher admitted that municipal corporations of Ontario had power to refer to arbitration, as he could not help doing in view of the number of cases arising on reference, but he contended that it was provided for by statute. The statute will be found in the Consolidated Statutes of Ontario, p. 1695, and that statute simply provides a particular way of appointing arbitrators, &c., from which the inference is that the power itself exists at Common Law. Further, the statute provides that the appointment of arbitrators shall not be made except under seal, from which the inference would be that at Common Law a seal is not necessary. Independently of that inference, however, there are authorities directly to the point that a seal is not necessary in transacting such matters as this reference. See as to the powers of corporations to refer, *11 U. C. C. P.*, 548; *1 Dillon*, 489; *8 Wheaton*, 338. See also a case referred

to by Dillon as a leading case in the United States, *7 Cranch*, 299, 306. See also *2 Peters, U. S.*, 318. In the case in *5 Howard* it was urged that the objection was not taken in the Circuit Court, but the Supreme Court held that it would not have been tenable if taken there. In *1 Dillon*, 255, it is said that the case referred to in Cranch is recognized as an authority all over the Union. The members of the Board of Works were all present from time to time during the progress of the arbitration, (*1 Dillon* 466, 467,) and so were various members of the City Council. On that point and as to the legal effect of the conduct of the members of the corporation, see *2 Kent's Com.*, 291; *14 Johnston*, 118.

The authority by which the cause is referred, even though the attorney assents to it, is the authority of the Court which has control of the cause. In *3 B. & A.*, 801, is a case to the effect that where a company is to sue and be sued in the name of one of the officers, such officer may consent to a reference and bind the company. *2 Exch.*, 344, was a case of reference consented to by the attorney of a railway company, not of a matter that the company was authorized to refer by statute. In that case the attorney was not appointed under seal, and it was held that though, perhaps, he could not recover his retainer, the company were bound by his acts in consenting to a reference to arbitration. An attorney has authority to refer without that authority being expressly given by his client, and that proposition is as extensively applied in the case of corporations as of private individuals. *11 U. C. C. P.*, 548. There the town agent of the attorney varied in essential particulars the submission originally assented to by the attorney, and the defendant corporation was held bound. See also *Russell*, 25, 26, 27 and 28, where the cases cited show that the attorney, (or even the counsel,) is master of the cause and can compromise or refer, even against the client's wish. *3 Taunt.*, 488; *2 Chitty's R.*, 193. There is a late case in which the client interdicted the attorney from referring, and afterwards the attorney consented to refer, and the client was held to be bound. *7 L. T. R. N. S.* 398. The same authority that the attorney has to refer enables him to waive any irregularities, and that applies as much to the attorney of a corporation as to the attorney of a private individual. See *24 Beav.*, 269, where the

case was that of a corporation, and the irregularity was that the witnesses had not been sworn. The client in such cases is held bound not only on the ground that there has been a fresh parol submission, but that there has been a waiver, and that the party who has waived an irregularity is estopped from taking advantage of it.

The Recorder does not stand in any position in relation to city causes different from that of an ordinary attorney. If he is to have only limited functions it is impossible to draw the line and say what powers he has and what powers he has not. The Recorder has, by the statute, the sole charge and management of the city's legal business. It is for the protection of the citizens that he is assigned the charge of the legal business of the city. The management of the legal business of the city is to be left to the judgment and skill of a barrister of a prescribed number of years' standing in his profession. His powers as attorney of the city, instead of being narrower, are in fact larger than those of an ordinary attorney. If we had the consent of the city under seal to a reference without the consent of the attorney of the city we would not stand in as strong a position as we do now, because the statute gives him charge of this business. The powers of attorney and counsel include all the powers essential and necessary to the control of the suit, and those powers are conferred by the Legislature on the Recorder.

The absence of the arbitrators occasionally is waived by proceeding in their absence. A corporation can waive the irregularity by going on just as a private individual could. *25 U. C. Q. B.*, 435. The present is one of the strongest cases of waiver that could be presented. See on this point *Wier* v. *Cumminger*, 2 Russell & Chesley, 173. The case in *25 U. C. Q. B.*, 435, was a compulsory reference. It was objected that the Court had no power to compel the reference. But the answer of the Court, upholding the award, was that the parties having gone on with the reference could not be allowed to advance such an objection. See also *33 U. C. Q. B.*, 331; *1 Practice Reps.*, 287, (Ontario); *2 Jacobs & Walker*, 261; *Willes R.*, 215; *3 Kay & J.*, 66; *Redman*, 96. As to the enlargement of the time, that may be made as effectually by the attorneys as by the arbitrators. If necessary the enlargement so agreed to

will be made a rule of court; *Redman*, 56; *6 E. & B.*, 719; *H.. & N.*, 831; *4 U. C. Q. B.*, 171; *Ib.*, 176; *Ontario Digest*, 137. The consent of the attorney to enlarge the time binds the client even where such consent is implied only from his conduct. *7 Price*, 636. Where the reference is by deed and the enlargement by parol it is held good and may be made a rule of court, and it is a good replication to a plea that the time for making the award had expired, in an action on the award. *5 B. & Ad.*, 488; *5 East*, 189; *6 Bing.*, 255. When power is given to arbitrators to enlarge the time and they fail to do it, the parties may do it. *Russell*, 137. Mere attendance will operate as an enlargement without express words. *Ib.*, 138. And an enlargement may be made even after the time has expired and after the award is made. *Ib.*, 141. See also *Russell*, 566, 567. Where the award is invalid on this ground, the proper course is to send it back to the arbitrators to make a valid award and to enlarge the time for making the award for that purpose. *L. R., 3 Exch.*, 261; *L. R., 3 Q. B.*, 4; *5 East*, 189; *3 D. & R.*, 446; *2 B. & C.*, 179.

The award is conclusive as to law and facts. *25 U. C. Q. B.*, 175. There it was held that the matter had been concluded by the reference of the cause and that the court could not consider the legal question raised by it. See also *5 U. C. Q. B.*, 523; *10 U. C. Q. B.*, 24; *2 Practice Reps.*, 377; *3 C. B.*, 705. A case was cited yesterday for the defence from *13 Mass.*, to show that even for the defence of the town the corporation could not raise funds. The case was that the corporation proposed to raise funds to give the State Militia additional pay. In 12 *Wallace*, 349, which was cited contra, it was decided that the City of Richmond had no power to issue bonds to support the rebellion. In another of the cases cited, the clerk of the municipality bought books to supply the schools, while the body provided with the funds for paying for them was the trustees. The other cases cited for defendant on this point are equally inapplicable. (The learned Attorney-General here analysed the cases referred to and distinguished them from the case under review.) The difference between courts of law and boards of arbitration as to consent is fundamental. The court of law can have no jurisdiction but what the law gives it. The jurisdiction of the arbitrator depends entirely on the

consent of the parties, and while consent cannot give jurisdiction to a court, arbitrators derive their jurisdiction from consent alone. (The Attorney General then dwelt at some length on the merits of the case as presented to the arbitrators.)

Shannon, Q. C., in reply.—The plan was seen by a number of persons, who say they saw indications of the eastern line. Had the plaintiff tendered for the western line and then been required to go on with the eastern line, he should have protested. As the Lord Chancellor said in the celebrated case of the Blackfriar's Bridge, he should have said *non in haec fœdera veni*. Instead of doing that he went on with an *arriere pensee* that he would eventually have a claim for extras against the city. As to the authority of an attorney in connection with a reference, see *Redman*, 11; *2 Exch.*, 344. This last is the most important case against us, but it was the case of a mere trading corporation. It does not apply to a municipal corporation. The Recorder is the attorney of the city and has authority in all ordinary matters, but he cannot exercise the extraordinary powers exercised by the Recorder in this case. The Recorder no doubt believed that he had the power to refer the cause to arbitration, but we contend that neither the Recorder nor the City Council had power to refer the cause to arbitration, because they are mere creatures of the Legislature and have only such powers as the statute gives them. *Otto's U. S. Rep.*, Vol. VI., 393, (decided in 1877,) shows that a corporation has only such powers as are expressly given or necessarily implied, (*Redman*, 8 & 9,) and can only exercise its powers by means of its corporate seal. *Broom's Commentaries*, 561. The only exceptions to this are grounded on convenience amounting to necessity. Here there was no necessity for the reference of the suit. *Russell on Arbitration*, 21, shows that the retainer of the attorney of a corporation must be under seal.

Sir William Young, C. J., now, (March 31st, 1879,) delivered the judgment of the Court:—

A rule of reference having been signed in this suit on the 28th of December, 1876, with the consent of the attorneys of the two parties on the record, and the three arbitrators, Barristers of this Court, Messrs. Gray, Ritchie and Sedgewick, having concurred in an award for the plaintiff in the sum of

$5001.42, dated September 7th, 1877, a rule *nisi* for setting it aside on various grounds and on the reading of numerous affidavits and documents, was granted on the 23rd of October, 1877, which was argued at great length and with great ability during the present Term. The leading facts of the case may be summarized as follows :—

In the year 1873 the City Council contemplated the construction of a brick sewer on the North Common, and Mr. Keating, who has been their Engineer for several years, prepared a plan thereof, marked by a red line, and running west of Egg Pond. From an apprehension that the pond would be drained thereby, the design was abandoned for a time, but was revived in 1875, when it was agreed that the sewer should pass to the eastward of the pond, and there is no question that this was the determination and purpose of the Board of Works and of the Engineer. He drew therefore on the same plan the substituted or dotted line which appears thereon, and by which the city authorities all understood that tenders were to be made and contracts entered into. This was unfortunate, as the want of a new and independent plan has led to the present difficulties and litigation. The plaintiff was the contractor, and the contract and specifications were carefully drawn, containing all the usual conditions and safeguards, referring to the works as they were clearly shown and designated upon the drawing; but the contractor was not required to sign the plan or specifically to recognize the dotted line. The Engineer did not believe that there was any considerable difference in the cost of excavating and constructing the sewer in one or the other of them. They are admitted to be on the same level, or nearly so. The Engineer does not admit that the rock excavation was greater on the eastern than on the western line, and the working plan, prepared originally for the western with the depths in red, was fitted for the eastern with the depths in black, and was put at once into the hands of the contractor, who began the construction thereon, as it was carried on accordingly by his assignees.

The contractor, Oakes, was paid for the value of his work for a few weeks, when he left, and Mr. Grant, who completed it, has been paid the full amount of the contract, (less a sum to be hereafter mentioned,) as the city authorities understood

it, when, to their astonishment. a new claim was started, on the ground that the contract price of $12,850 was for the work to have been executed on the red line; that the drawing or plan referred to in the contract was the plan of 1873, and that an additional cost of about $3000 had been incurred by the actual construction of the sewer on the dotted line. Now, certain extra works had been authorized by the Engineer under the 39th and other conditions in the specifications, and those were paid for. But it was not contended that his consent had been either asked or given for extra work, adding one-fourth to the contract price. The Engineer was examined at great length before the arbitrators, and he has made two long affidavits, and the strong expressions he has used sufficiently show that he considers the claim to be an afterthought and an overcharge. His affidavits go much more into detail, in one particular especially, than his examination, and, if true, they are decisive of the merits. They are assailed in terms equally strong, and it must be admitted that there are many circumstances favoring both sides of the question. Mr. Keating swears that the tracing first submitted by him to the Council, the linen plan as it is called, was never exhibited to any one as the plan in the advertisements, nor seen by any of the parties who tendered for the work, and that it was placed in a private drawer in his office, to which they had no access. The most contradictory evidence is given upon the plan that was in fact exhibited, and some of the witnesses declare that, with a view to tender, they tested the depths upon the red line. But, with the strong impression upon the minds of the city authorities, it is not to be wondered at that the claim was warmly resisted. The action was then brought. It was referred by the City Council to the Recorder, who put in several pleas, but assented to a reference. Now, as far as the suit involved matters of mere account, this was the proper course, and would probably have been ordered by a judge, but as regarded the eighth, ninth and other pleas as matters of legal defence, the city lost the protection of the Court on the main fact that the extras in dispute had not been ordered by the Engineer in writing. The competency and high character of the arbitrators is known, of course, to us all; but they had a larger scope and a more ample authority than if they had

been Judges bound to administer the strict rules of law, which, with the mass of evidence, were the main reliance of the city. Neither do I question for a moment the good faith of the Recorder, whose authority to enter into a reference I shall inquire into before I close. Another remarkable circumstance occurred in the case, and led to the second clause in the award. The city is called upon to pay a second time a sum of $1727, which they advanced to certain claimants, under circumstances I need not go into, on a bond of indemnity, we were told, from Almon & Mackintosh, which will protect them, I think, in due time, from loss.

The sittings of the arbitrators for many days and the printed pamphlet of evidence extending to upwards of 3000 lines, sufficiently show the earnestness and fulness of their inquiry, and the plaintiff reaps all the advantages of an award unimpeachable upon the face of it and giving him almost an impregnable position. On the principles well established in this Court, and recognized this Term in the case of *Sumner et al.* v. *Barnhill*, 3 R. & C., 501, and in the English cases, among many others, of *Hodgeson* v. *Fenney*, 3 C B., N. S., 189; *Bagaly* v. *Markwick*, 10 C.B., N.S., 61; and *Favell* v. *The Eastern Counties Railway Company*, 2 Exch., 344, such an award cannot be set aside, but is a final adjudication, both on law and fact, if the reference has been duly ordered and conducted and the foundation of it cannot be impeached. It is to this inquiry that we must now address ourselves. First of all it was urged that the defendant, being a municipal corporation under the legislative charter of 1864, and the act conferring no power to arbitrate, such a power could not be implied, and various passages from *Dillon on Municipal Corporations*, were cited at pages 93, 173-5, with the judgment of Chief Justice SHAW, from *23 Pick.*, 71, on the nature and extent of the powers incident to such bodies, and essential to the due exercise of their functions. But on this particular subject, strange to say, nothing is to be found in *Angell & Ames*, 9th edition, nor in *Abbott's Digest on Corporations*, and but a single note in *Dillon*, p. 488, referring to three Canadian and two American cases, five in all, three of which are beyond our reach. There is an obvious distinction between trading, railway and other corporations of a like character, and municipal corporations having powers of

taxation and control analagous to those of a government. To the former, powers to submit to arbitration are often given by statute, (*Fisher's Digest*, 7323–4,) implying that the interests of shareholders could not otherwise have been left to arbitrators. In one of the above five cases, *The Corporation of Brant* v. *The Corporation of Waterloo*, 19 U.C.Q. B., 450, the arbitration was provided for by the act, and in the other, *Alexandria Canal Company* v. *Swann*, 5 Howard, 87, the reference to arbitration was made under and in pursuance of the acts of the General Assembly of Maryland. All that Redman says in his treatise on awards, fol. 8, is that corporations, sole or aggregate, may submit to arbitration, and he cites *Rolle's Ab., Arb.2, A.3*, a venerable authority, but of little weight on matters of modern usage. In *The Eastern Union Railway Company* v. *The Eastern Counties Railway Company*, 2 E. & B., 530, the arbitration was authorized by the act. In Favell's case against the same company last named, and already cited from the report in 1848, eleven years before Lord Cardwell's Act, the same authority probably existed, as no question upon it is raised. This is true also as respects the case of *Tomlin* v. *The Mayor and Commonalty of Fordwich*, 5 A. & E., 147 where the award was treated on both sides and by the Court as valid, and part of it only as bad. But for this case, decided in 1836, I should have been inclined to hold that a municipal corporation had no such power, and I yield to it now with considerable doubt. And if it can be legally exercised at all, this case abundantly shows that it ought to be exercised with the greatest caution, and with full knowledge of the nature and extent of the claims communicated to the members or the governing body of the municipal corporation.

The reference in this case was made, not by agreement or bond requiring the corporate seal, (per GWYNNE, J., *20 U. C. Q. B.*, 267), but by the consent of the Recorder as the attorney of the defendant; and the next question turns upon his authority as such. There seems to have been a strange misapprehension among the city authorities on this head, as appears by the affidavits of the Mayor, the Recorder, and the members of the Board of Works. The most of these were under the impression that the reference had been, as the Recorder had no doubt it would be, ordered by a Judge as a compulsory arbitration,

which it probably would have been unless the real character of the inquiry and claim had been disclosed. The matter, in fact, had not been duly thought of, and it is difficult, and perhaps unfair, to attach more of responsibility to any one officer or member of the corporation than to any other. But the argument having been directed largely to the office and authority of the Recorder, it is proper to say a few words on that head. The office was created by the original Incorporation Act of 1841, section 57, when the duties were not defined so fully as in the Consolidating Acts of 1851, section 76, and 1864, section 101, which are nearly identical; the former of these Acts having been prepared by the late Mr. Murdoch, the then Recorder. It was suggested at the argument that section 101 conferred on the Recorder an independent authority, and, having been empowered by the Legislature to act as attorney and counsel for the city in any suits in the Provincial Courts to which the corporation was a party, that he was no longer under the control of the City Council, whose only remedy during his term of office was his removal, under section 79. But I must entirely repudiate such a construction and hold the Recorder, as Attorney and Counsel for the city, to have no other or higher authority than the attorney or counsel for any other suitor. But it cannot be denied that he has the same authority as if acting for a private suitor. In England, a corporation cannot make a valid appointment of an attorney to conduct suits or manage its affairs except under its common seal. *Arnold* v. *Poole, (Mayor, &c.,)* 5 Scott, N. R., 741. See also *10 L. T. R., N. S.*, 411; *Fisher's Digest*, 1972. But here the appointment is by statute, and it must carry with it the usual and necessary powers of an attorney, and one of these is the power to refer a cause, according to *Filmer* v. *Delber*, 3 Taunt., 486. This power remains even where the client has expressly desired the attorney not to consent to any rule of reference; but this I would be slow to accede to. The general power, however, without consulting the client, is recognized in many cases enumerated by DRAPER, C. J., in *Wilson* v. *Corporation of Huron and Bruce*, 11 U. C., C. P. 558; which, in some cases not free from doubt, has been extended to counsel, (*Redman*, 12,) a distinction having no application or bearing here. On this point, I deem it right to quote from the case in *5 Howard*,

already cited, the opinion of Chief Justice TANEY, on a question of damage. "The corporation," said he, "was a party to the action in Court, and it might lawfully take any step that an individual might take under like circumstances to bring it to final judgment, and a trial by arbitrators appointed by the Court, with the assent of both parties, is one of the modes of prosecuting a suit to judgment, as well established, and as fully warranted by law as a trial by jury." Still, however, there are cases, and this, in my judgment, is one of them, where a trial subject to the controlling power and supervision of a Court is to be preferred. Corporations and insurance companies relying on legal defences are safer with an open trial and argument.

Two questions remain,—enlargement and waiver.

The first of these we may assume would never have been taken did not the counsel for the city deem themselves justified in raising every objection that might possibly defeat this award. The same observation applies *a fortiori* to the occasional absence of two of the arbitrators. The rule of reference provides that the award shall be made and published "on or before the first day of May, or on such further or ulterior day as the said arbitrators, or any two of them, shall from time to time indorse on the said order." Two extensions are indorsed, each by two arbitrators, to the 1st of July and the 1st of September, 1877. Then follows a third, on the 31st of August, extending the time to the 8th of September, but signed by the two Attorneys. The award is dated the 7th of September, under this last extension. The general rule is laid down in *Redman on Awards*, pages 51, 52; "If the submission mentions a time within which the award must be made, that is a condition that must be strictly complied with unless further time be given. The mode of enlargement by the arbitrator depends entirely upon the terms of submission. A power to enlarge in some particular way specified in the submission must be strictly pursued." I refer to the cases cited in the order of their dates,—*Payne* v. *Deakle*, in the year 1809, 1 Taunt., 509; *Davis* v. *Vass*, 15 East., 97, where there was an affidavit that the defendant had been served with a copy of the rule having the indorsements for enlargement upon it, and attachment was refused; *Leggett* v. *Finlay*, 6 Bing., 255,

where it was held that the parties may confer sufficient authority by consent as by attending meetings; *Mason* v. *Wallis*, 10 B. & C., 107, where the enlargement was to be for such day as the arbitrator shall appoint in writing under his hand to be endorsed on the order, and the Court or a Judge thereof shall order, and the arbitrator endorsed the enlargements, but no Judge's order was obtained, and an attachment was refused; *Reade* v. *Dutton*, 2 M. & W., 69, where the cause was referred to two arbitrators, with power to appoint a third, and power for any two of them to enlarge the time, and, the first two named having enlarged the time before appointing the third, an attachment was refused, PARKE, B., observing; "It does not follow that the party may not be bound by the award, because there may have been a new submission by parol, but it cannot be enforced by an attachment;" *Dunstan v. Norton*, 13 L. T. R., N. S., 722, where the submission was on June 17th, 1865, with power for the arbitrator to enlarge the time fourteen days after July 14th. He enlarged the time to July 18th, and then to August 17th and September 12th. The enlargements after July 18th were held to be bad, and SHEA, J., on the authority of *Mason* v. *Wallis*, set the award aside in the Bail Court. There are a few other cases in *Russell on Arbitration*, 130 to 140, and he states as the general rule, (fol. 132,) that if the submission direct the manner in which the enlargement is to be made, that direction should be literally followed. In other words, a delegated authority must be exercised with an exact fulfilment of the conditions on which it was granted.

Now, as to the question of waiver, Redman, when citing *Reade* v. *Dutton*, observes that the objection therein, which was exceedingly strict, as above stated, is not waived in such a case by the party attending before the arbitrators, cross-examining the witnesses, and the like, and cites *Hall* v. *Rouse*, 4 M. & W., 24. *Redman*, at page 56, and so also *Russell* at page 186, state the circumstances under which irregularities in the conduct of the arbitrator or arbitration may be waived, and a new submission may sometimes be presumed. It may be said that the arbitrators, by referring in their award to the rule of the 28th of December, and the endorements thereon, adopted and assented to the last of these endorsements signed

by the attorneys, but the assent of the arbitrators could not give them jurisdiction for which their own indorsement on the rule was imperatively required. In some of the cases the arbitrators made their award after an enlargement imperfect in point of form, as for example, in *Mason* v. *Wallis*, where there was no waiver, so far as the last enlargement was concerned, and the award was not enforced. The consent either of the arbitrators or the parties is not always enough, and in *McCulloch* v. *White*, 33 U. C. Q. B., 340, it was said by WILSON, J., delivering the judgment of the Court, that the authorities show, whether the original submission was by deed or not, that an enlargement fixed—that is, the terms of the enlargement fixed by it—if not by deed, or according to the deed, is nevertheless sufficient to make a good substituted submission, and that all the laws of the original submission are contained by and incorporated with the new submission so far as they are applicable. But to act on the presumption of a substituted or of a parol submission here, even if such a submission could bind a municipal corporation, or apply to a reference in a suit standing upon the record, would be at variance with all the facts.

The evidence was closed on the 22nd July, 1877, as appears by the printed minutes, and as each of the arbitrators, as appears by their joint affidavit, read over and carefully considered the whole of the evidence, they probably took the interval between the 22nd of July and the 7th of September to make up their minds and agree on the award. There is no evidence or statement in the affidavits of any attendance upon them, any evidence produced, or any argument by the parties after the 1st of September, when their authority under the second enlargement had ceased and was at an end. No case has been cited, nor have I found one, of an enlargement by the attorneys when required to be made by the arbitrators. The nearest approach to it is the case of *McCulloch* v. *White*, already cited, where the enlargement was by the parties themselves,—a stronger case than the present. The submission was by deed, providing that the award should be made on or before the 1st of July, or such further time as the arbitrators, by writing, endorsed on the submission, might from to time appoint. It was then averred in the declaration that after

the arbitrators had entered upon the reference, the plaintiff and defendant, by writing under their hands, enlarged the time for making the award to the 1st of December, and the award was made on the 30th of November, and upon demurrer the Court held it as certain that, in view of the covenant in the deed, no action could have been taken on the award, and that the suit must fail if it were held that the action was brought upon the deed.

Now, it must be admitted in this argument that judgment can be had only upon the authority conferred by the rule of reference, and that the enlargement was not made in accordance with the rule. It follows, therefore, as I think, inevitably, that the award cannot be sustained, and that the rule for setting it aside should be made absolute, with costs. In taxing these costs, however, an immense mass of written and printed matter that had little or no bearing on the points that were arguable, should be shut out, and allowance made for the papers only that were essential.

Since this judgment was prepared, a technical difficulty, as it may be called, but striking at the root of it, has been started, which it is necessary to examine. If mentioned at all at the argument, and I am not aware that it was, it was only incidentally and without the citation of any authority or cases. By the rule of reference it was ordered that judgment should be entered upon the award for the amount thereof, and of the cost of reference in the same manner as if a judgment of this Court had passed in the cause. The award, as we have seen, was signed on the 7th September, 1877, and the Court did not sit until the 11th December. The defendant's counsel therefore applied to me at Chambers, producing a large body of affidavits and documents, on the 23rd October, and I granted the rule *nisi* for setting aside the reference and award which we have argued so much at length, making it returnable at the full Court in the December term, and staying proceedings in the meanwhile. This course, as we all know, was according to our usual practice, and is recommended by the most obvious reasons of convenience and of justice; but now it is urged that a Judge in vacation and at Chambers, has no authority to grant such a rule, and that the whole of the pro-

ceedings under it are a nullity. Were it so, the only effect would be a discharge of the present rule, probably without costs, as the point is new and there was no preliminary objection, and the granting of a second rule *nisi* by the Court to be argued at a future term.

Are there any real objections then to the rule *nisi* as it stands? The powers of a Judge at Chambers are discussed in *Tidd's Practice*, 509 to 511; in *Archbold's Practice*, 1598; in *Chitty's General Practice*, 3, 19; in *Doe* v. *Preston*, 9 Bing, 104; in *Smeeton* v. *Collier*, 1 Ex., 457, and in many other cases. "By long and established usage," says *Chitty*, "each of the Judges of the three Superior Courts of Common Law has, at Common Law, and independent of any legislative authority, at his Chambers, exercised a very extensive jurisdiction over certain minor and practical proceedings, especially irregularities that arise in conducting an action or defence, and this as well in the vacations as during the four terms." "It would be difficult," he adds, "to trace the inception of this practice. The authority of a Judge at Chambers to make orders in the various cases which are brought before him is, upon principle, the authority of the Court itself; his order may be considered as an inceptive act of the Court." And he then proceeds to point out the cases in which a Judge at Chambers has and has not jurisdiction. This was in 1835. *Tidd*, in his 9th edition, in 1828, folio 511, says; "a Judge at Chambers will not set aside an execution or other act of the Court; but, when the justice of the case requires it, he will stay the proceedings in vacation, to give the party an opportunity of applying to the Court at an ensuing term." Where, it may be asked, did a Judge obtain this power, which has always been recognized, and, in the case in hand, would have answered every purpose of the defendants? Not from statute, but from Common Law, and the necessity and justice of the thing. Mr. Parkinson, Chamber Clerk to Mr. Justice BYLES, in his *Hand-book for Common Law Chambers*, published in 1861, remarks on the vast amount of business then recently introduced into the Chambers of the Judges by the Procedure Acts of 1852 and 1854 and numerous other modern statutes, and of which I can speak from my own observation, having sat on several occasions in 1876, while Chambers were held before the Judges at

Sergeants' Inn, and witnessed the incessant flow and variety of the cases they dispatched.

The difficulty, if it be a difficulty, and I can scarcely treat it as such, has not proceeded out of the chapter on arbitrations, where the control of a single Judge over a compulsory award is recognized in section 13, and, presumably, in section 14; and it would be an incongruity to deny him a reasonable control over a voluntary award in a suit or independent submission, but from what I look upon as a misprint in the Fourth Series of our Revised Statutes. In the First Series, chapter 134, sec. 123, provides that, "When a Judge has power to grant an order, he may, in place thereof, grant a rule *nisi*, returnable in term," which was only an affirmation of his Common Law right. This was re-enacted in the Second Series, chapter 134, sec. 233. So in the Third Series, chapter 134, section 238, adding, "and the Court, in term, may make a rule returnable at Chambers." But, in the Fourth Series, chapter 94, sec. 5, runs thus; "When a Judge has power to grant an order, he may, in the place thereof, grant a rule *nisi* returnable at Chambers."

This could never have been intended to debar a Judge from making a rule *nisi* returnable in his own Court. The inconvenience and absurdity of such a limitation are too apparent, and the true solution, as I think, is the omission of a line in printing, and I regret that after a diligent search, made at my request by the proper officers, the manuscript copy of the Fourth Series, strange to say, cannot be found.

DESBARRES, J., concurred.

MCDONALD, J.—The rule of reference in this cause authorized the arbitrators to enlarge the time for making their award, and they did so twice; but the attorneys in the cause subsequently undertook to do what the Court authorized the arbitrators alone to do,—to enlarge the time, and I am reluctantly forced to the conclusion that the enlargement so attempted to be made is not only irregular but void, and the defect cannot, therefore, be waived. Had the submission been by bond or deed, the consent of the parties, endorsed by deed poll, would have been sufficient; *Greig* v. *Talbot*, 3 D. & R., 446; *2 B. & C.*, 179. But this is not a submission by bond or

deed, and, if it were, the attorneys or counsel acting for the parties at the investigation could not, in my opinion, without a special authority in writing, duly executed by the parties in difference, have enlarged the time limited by the submission. We are now dealing with a cause in Court, and it is not the consent of the attorneys, but the authority of the Court, given by the rule of reference, that gives jurisdiction to the arbitrators, to be exercised in this case within a limited time unless that time should be enlarged by the arbitrators appointed, and in the manner prescribed. It is true that without the consent of the parties or their attorneys in a cause, the Court would not—I will not say could not—give the necessary power to the arbitrators, except under the act for compulsory references; but still it is from the Court that they derive their power. I think that, to render the award valid, the direction of the Court, as contained in the rule of reference, should have been followed. I feel convinced that no attachment could issue against a private individual for non-performance of the requirements of an award made after such an enlargement as this, simply because it would be no contempt of Court at all to refuse compliance with the terms of an award made not in accordance with the directions of the Court, and under no authority which was made a rule of Court,—in fact, without any authority at all, except the assent of the attorneys. There is no means of now making such assent or enlargement a rule of Court after the award is made.

At the argument, I suggested this difficulty to the learned counsel for the plaintiff, but heard nothing to remove it; and, after carefully considering it, I have come to the conclusion that it is impossible to get over it.

I may add that I have looked into all the cases cited on this point, and many that were not cited at all; and, although in some of them the parties objecting were held to be estopped by their subsequent acts from disputing the regularity of the enlargement, and although in other cases, for similar reasons, sufficient consent was presumed to have been given, I could find none in which it was held that in a case like this, referred under a rule of reference, the consent alone of the attorneys was sufficient. The city cannot be estopped on the ground of

any subsequent action, because, until this motion was made, it took no steps at all in the matter, so far as appears by the papers before us; nor was there any waiver of the irregularity for the same reason, even if the enlargement could be called an irregularity, which I think it cannot, as it was an act not authorized by law, and therefore void. *Archbold's Practice*, (12 ed.,) 1655, gives the proper directions to enlarge the time in cases of this kind, when it is sought to be done under an authority not given in the rule of reference. There cannot, I think, be a doubt that in such cases the enlargement to be valid, must itself be made a rule of Court, which was not the case here.

I think that neither the affidavits, so far as they relate to the merits of this case, nor the evidence ought to have been read, and, therefore, do not feel at liberty to express an opinion on the merits, any further than to say, that as the case was presented to the arbitrators, I do not see how they could have decided differently from their award, if they had the power to make an award at all.

The provision in the rule of reference,—"the matters hereby referred to or any of them may be remitted to the consideration of the said arbitrators," does not appear to me to mean that the rule itself may be remitted for the purpose of enlargement. It forms no part of the matters referred all of which, I think, were properly decided by the arbitrators, and, therefore, it would be useless to remit them.

WEATHERBE, J., delivered the following dissentient opinion:

This cause was, by consent of "the parties, their attorneys and counsel," referred in the ordinary way to arbitration, and, by the like consent, Messrs. Ritchie, Gray and Sedgewick, Barristers of this Court, were chosen as arbitrators, and a rule of Court was passed to this effect. 28th December, 1876, and, after twenty-nine meetings, the arbitrators made their award on the 7th September, 1877, in favor of plaintiff. On the 23rd October, 1877, an application was made on behalf of defendants to set aside both the rule of reference and the award, on twenty-one grounds and affidavits and documents including over 3000 lines of evidence, taken before the arbitrators;—in all nearly 8000 lines have been read on the argument.

The only ground relied on to set aside the rule of reference was that the Recorder and attorney of the city had no power to refer the cause. This was not supported by any authority, and there seems to me to be nothing clearer than the power of the Recorder and attorney to refer the cause. It would be a signal instance of bad faith to withdraw now from the agreement entered into and made a rule of Court, and the Court, it appears to me, ought not in any way to encourage such conduct. The same legislative power under which the City Council has its existence requires the appointment of a Recorder who shall be a Barrister of at least five years standing, and defines it as a part of his duty to take charge and management of all legal business connected with the affairs of the city, and to act as counsel and attorney for the city in any suits within the Provincial Courts to which the Corporation is a party. This seems to me to clothe the attorney in this suit, acting on behalf of the defendant Corporation, with all the powers possessed by an attorney in any suit, and I think it too clear for discussion that the defendant must fail in his application to set aside the rule of reference in this case. We are all agreed, I believe, on this.

Besides the above ground, on which was attacked the award as well as the rule of reference, the only other grounds relied on to set aside the award were, (1) that the arbitrators had exceeded their powers; (2) that there was occasional absence of one or other of the arbitrators during the sittings, and, (3) that the time for enlarging the award agreed to by the attorneys was not endorsed by the arbitrators, or two of them, on the rule of reference.

As to the first ground, it is admitted that there was nothing in the award to shew that the arbitrators had exceeded their authority.

The remaining grounds could have been brought before the Court upon matter which might easily have been contained on two or three pages of foolscap, so that, it appears, under the alleged necessity for establishing this excess of authority, nearly the whole of this voluminous mass of papers has been presented to the Court, and extraordinary expense has been incurred. I ventured to say on the argument what I consider it proper now to repeat with emphasis, namely,

that defendant should not have been permitted to read these affidavits without some show of authority. No authority whatever was given for going into the evidence, and the Court, I understand, cannot look at it. At any rate I believe there is a majority of that opinion. If we could remark at all upon that mass of material, we should be compelled, I think, to say that there was nothing done by the arbitrators to which the Court could in the slightest degree take exception. Our duty, I think, in pronouncing strongly against the course pursued by defendant, apart from the very great time wasted and the very great inconvenience and embarrassment, unnecessarily caused to the Court, in this instance, arises from the necessity of preventing this case from being drawn into a precedent, as it otherwise would. Where is there anything manifested on the part of the defendant which would enable us to draw a distinction against *any* party dissatisfied with an award from reading to us the whole evidence, and dragging into the case matters foreign to the question legally before the Court? I think, moreover, it is to be considered that the largest part of the costs and expenses of this controversy has been caused by conduct on the part of defendant, for which there is no authority and no justification,—and I am not, I believe, alone in this,—a course, if sanctioned by the Court, that would breed endless litigation, and result in evil consequences.

With regard to the absence of the arbitrators on the hearing, that has been clearly waived by the consent of the Recorder and attorney and the learned counsel who represented him. I believe we are all agreed on that. I can only say, if, after the consent given in such a case, any authority could have been found to justify the Recorder or his client in coming here to ignore that consent and take advantage of it, because the award turned out to be against the defendant, I should have been very much astonished, and I do not see why it required any very great research to discover that that ground was untenable.

The only remaining question for consideration is, whether the enlargement of the time for making the award was required to have been made by the arbitrators, or two of them, in writing, under their own hand, or whether, having

been endorsed in writing by the attorneys and adopted by the arbitrators, that was not sufficient; or, whether, even if not made within the terms of the rule of reference, the parties are not stopped from taking advantage of the irregularity. And I regret that on this point I cannot bring my views into accord with those of my learned brethren, and, what is more unfortunate for me, I wish to say, with deference, that I am not able to understand,—though I have diligently and patiently endeavored to discover,—I am not able to see any authority whatever to meet the very clear and weighty authorities for refusing, in all cases of this kind, to break up the agreement of the parties. In *Evans* v. *Thompson*, 5 East., 189, there was a submission by bond with a condition for the performance of an award to be made within a given time. Before the expiry of the time the parties, by an endorsement on the bond, enlarged the time. By the bond, the submission was to be made a rule of Court, but in the endorsement it was not agreed that the enlargement should be made a rule of Court. A rule, reciting the bond of submission and the agreement that it should be made a rule of Court and the agreement to enlarge the time, directed that the *same* should be made a rule of Court. An attachment issued for non-performance of the award, and a rule *nisi* was obtained for amending the rule of the Court by confining it to the submission made by the bond and condition, and excluding the endorsement. After argument and consultation with the Judges of the other Courts, it was held that the agreement to enlarge the time was to be considered as incorporating all antecedent agreements relative to that subject, as if the same had been repeated therein; and, among the rest, that the submission should be made a rule of Court, and that with reference to the enlarged time instead of the time originally specified in the condition of the bond.

Davis v. *Vass*, 15 East., 97; *Halden* v. *Glasscock*, 5 B. & C, 390; *Dickins* v. *Jarvis*, 5 B. & C., 528; *Mason* v. *Wallis*, 10 B. & C., 107; *Reade* v. *Dutton*, 2 M. & W., 69; *Masecar* v. *Chambers*, 4 U. C. Q. B., 172, are all cases of motions for attachment, and it must not be forgotten that there is a clear distinction between such cases and this, where the motion is to set aside the award. In *Tunno* v. *Bird*, 5 B. & A., 496, PARKE, B., said; "Whether

under circumstances like these an attachment would issue for non-performance of the award, (it having been made a rule of Court,) may be a different question: this is not the case of an attachment or an action, *but a motion by one of the parties to set the award aside.*" Besides, in the case of *Haldon* v. *Glasscock*, HOLROYD, J., said; "To bring the party into contempt *at least* it must be shown that *the enlargement of the time was by consent.*" So that it appears even here, not only that the award should be sustained, but that there might be an attachment. In *Dickens* v. *Jarvis*, the arbitrator had power to enlarge the time for making his award by endorsement on the order of reference. That order, with two endorsements enlarging the time, was made a rule of Court, and it was held, on moving for an attachment for not performing the award, not necessary to produce an affidavit that the indorsements were duly made. In *Mason* v. *Wallis*, the time of enlargement required an order of the Court or a Judge, but it was made without such, and, in refusing the attachment, BAYLEY, J., in delivering judgment, said; "Assuming the defendant waived the objection by attending before the arbitrator, *still there is no waiver, so far as the last enlargement was concerned.* The arbitrator had no authority, therefore, when the award was made."

Dunstan v. *Norton*, 13 L. T. R., N. S., 722, in the Bail Court, is relied on. The award was to be made on July 14th, or such further day as the arbitrators might appoint. The terms of submission then gave the arbitrators power to enlarge the time for making the award fourteen days. One enlargement was made within the fourteen days to July 18th, another beyond that to August 17th, and another to September 20th, and the question was whether the enlargement after July 18th was good or not. It was admitted the meeting on that day waived previous irregularities, and without previous consent or subsequent appearance of the parties there was an enlargement to September 20th, which, on the authority of *Mason* v. *Wallis*, was set aside, on the ground that attendances act as waiver only *pro tanto*. That the case is not at all in point must be quite apparent. And in *Reade* v. *Dutton*, PARKE, B., said; "It does not follow *that the party may not be bound by the award* because there may have been a new submission by parol, but it cannot be enforced by attachment."

In *Masecar* v. *Chambers*, what the Judge, (MACAULAY, J.,) said was this; "It seems clear that when the time for making an award is enlarged the enlargement, whether by the parties, the arbitrators, or by a Judge's order, should be made a rule of Court as well as the original submission." Many things would be bad, irregular and invalid in law, which the consent of the parties makes good, and it is considered highly dishonorable and even fraudulent to lie by with the view of obtaining an award, and then, when disappointed, to come forward and apply to the Court. The Courts seldom fail to denounce such a practice, even when compelled to yield.

In the case under our consideration the award was to be made on or before the first day of May, or on such further or ulterior day as the said arbitrators, or any two of them, should from time to time endorse on the order. There is one enlargement by the three arbitrators, and another by two of the arbitrators, with an endorsement of consent by the attorneys. This legally extends the time to the first day of September, and then follows the extension in question, as follows:—

"We extend the time for making the award under the within rule to the 8th day of September, 1877.

JOHN S. D. THOMPSON,
Plaintiff's Attorney.

W. SUTHERLAND,
For Defendant."

The case of *Legget* v. *Finlay* was an application to set aside the award, and is much in point. By a Judge's order an award was to be made by the first day of Trinity Term, or such further time as the arbitrator should appoint by endorsement on the order. Under this there was a regular enlargement and a further enlargement under a Judge's order which was acted on by all parties. The award was made within the time of the second enlargement, but the arbitrator made no further endorsement on the original order. The award was against the plaintiff; his alleged consent to enlargement of time was by an act of his attorney. TINDAL, C. J., in delivering judgment refusing to set aside the award, said; "The objection to the award is that according to the power originally delegated to the arbitrator, the time for making his award *could only be*

enlarged by endorsement in his handwriting. * * * * If, however, *the parties consented to make an application* for a Judge's order to authorize a second enlargement, we think that a sufficiently formal mode of *concurring in the enlargement to warrant the arbitrator in proceeding*, and the only question here is whether there be sufficient evidence of such concurrence. * * * * As to the mutuality of consent which it is said ought to appear on the part of defendant to make the plaintiff's consent available, we think it sufficiently appears by the defendant's attending the meeting in question. The difficulty in most of the cases was to find some evidence of the consent, such as attending meetings or the like, but here there is no difficulty, as the consent is admitted." GASELEE, J., said; "I was disposed to think, at first, that this enlargement was made without authority, but, upon hearing the circumstances of the case, I think a sufficient authority has been shown. It is clear that parties may confer a sufficient authority by consent, as by attending meetings, and here what is equivalent to consent has taken place on both sides."

In the matter of *Tunno* v. *Bird*, 5 B. & Ad., 496, there was an application to set aside an award. By the agreement under seal between the parties, the umpire was to be appointed by the two arbitrators, by writing. He was *chosen by lot.* An arbitrator was substituted for the one mentioned in the deed by an endorsement, *without seal.* There was also a question of non-reception of evidence. TAUNTON, J., addressing counsel on the argument, said; "*You lie by and take the chance of the award, and, when disappointed, come to the Court to set it aside.*" * * * DENMAN, C. J., in delivering judgment, said that as to the appointment of umpire by lot the law as laid down is that a choice *by lot is bad*, and the appointment must be made by the will and judgment of the two arbitrators, *unless the parties consent* to or acquiesce in some other mode. TAUNTON, J., said; "To hold this an insufficient appointment would be *impeaching the solemn act of the parties.*"

Andrews v. *Elliott*, 5 E. & B., 502, was a case tried without a jury under 17 & 18 Vic., chapter 125, by section 1 of which act consent in writing, signed by the parties or their attorneys, is necessary to such trial. On a motion for new trial because the statute had not been complied with, CAMPBELL, C. J., said;

"Had the direction of the Judge been embodied in an order, and the consent of the parties been reduced to writing and signed, the trial would have been perfectly regular. I am of opinion that, *rebus sic stantibus*, it is not competent for either party to impeach the trial, because there was not such a written order nor such a written consent. To raise such an objection after verdict is against good faith." COLERIDGE, J., said; "I do not wish to lay down that the trial is good for every purpose; for example, I express no opinion whether a witness might be indicted for perjury on the trial. But * * * * there was sufficient general jurisdiction to try the cause, and the plaintiff is precluded by his conduct from taking the objection." WIGHTMAN, J., said; "I am of the same opinion, Mr. Justice Bramwell had general jurisdiction to try, and the parties are precluded from objecting to the want of the preliminaries." The decision was affirmed in the Exchequer Court on Error, WILLES, J., deciding on the rule that *consensus tollit errorem*.

When I read this case I was unable to perceive how it was possible to disturb this award. It was not a case of an award, but it was none the less in point, as will be seen by reference to the following. When I read the following case I took it as a thing settled beyond all doubt or question that it would be impossible, if we were bound by English law, to make this rule *nisi* absolute. But it appears that I was altogether too sanguine; I find by the opinions just expressed that there is good reason to doubt. In *Tyerman* v. *Smith*, 6 E. & B., 719, there was a compulsory reference under the Common Law Procedure Act, 1854, and, on motion to set aside an award against plaintiff and the judgment thereon, it was contended that the award was void because not made within three months after the reference was entered on, and there being no written consent of parties to enlarge the time as required by section 15 of the act. The plaintiff, after the expiry of the time, had treated the arbitration as still going on, requesting the arbitrator to enlarge the time, and after the award was made he applied, unsuccessfully, to have it sent back to the arbitrator. It was contended that his conduct amounted to a written consent, or, at least, that it estopped him from denying the authority of the arbitrator. Here is the mode in which Lord Chief Justice CAMPBELL treated this state

of facts. In delivering judgment, he said; "Mr. Phipson," (plaintiff's counsel,) "has done his duty and no more; but the conduct of his client has been most fraudulent throughout the whole transaction. This I mention for the purpose of saying that I covenant with myself not to be influenced by that consideration. I proceed on the ground that the plaintiff is estopped by his conduct from objecting that there was no written consent for enlarging the time. It is admitted that the award would be good if there were such consent, but it is contended that for want of it the statutory authority does not exist. But I think that the plaintiff is estopped from saying that there was not such a written consent as was essential to the statutable authority." *Andrews* v. *Elliott* is expressly in point. COLERIDGE, J., said; "So here the master had power to take a compulsory reference, but he could make his award only within the three months, unless there was a written consent for the enlargement of the time. Now, the plaintiff's conduct has been such as to estop him from contending that there was no written consent." ERLE, J.; "I concur in what has been said. The master had the three months to make his award in, and, in case of a consent in writing, any further time; there is no express enactment that without such consent the award shall not be made after three months. At the expiration of the three months both parties acted as if the arbitrators were still exercising a valid authority." * * *

This last enlargement made by the attorneys in the case before us and the others previously made were endorsed in writing on the rule of reference, and, in making their award the arbitrators use these words; "We have heard the parties and their witnesses, and fully considered the matters referred to us under the annexed rule made on the 28th day of December, A. D. 1876, *and the endorsements thereon*, and we do award, &c."

The cases cited do not seem to me to be necessary to sustain this award, for here the parties,—I say parties, for I trust it will not be questioned that to repudiate the solemn written consent of the attorney and look behind him in these cases, to see what is the wish of the party, would lead to all manner of confusion in this Court,—the parties consented to the necessary and reasonable extension, and can it be denied that

the arbitrators, having upon this, within the time limited, made and signed their award, adopted this written enlargement as their own?

In *McCulloch* v. *White*, 33 U. C. Q. B., 336, the reference was by deed, and the enlargement of time was by parol, and not, as required, by deed. The question was raised on demurrer, and WILSON, J., in delivering judgment, said; "If the action is brought, not upon the deed of delivery, but *upon the award*, then the enlargement may be maintained, as showing a new submission to be entered into between the parties. * * * An enlargement in writing under the hands of the parties was made, and so, not by deed, nor in accordance with, but contrary to, the deed; and after that informal and inefficacious enlargement, so far as it could have any operation upon, or continuance of the deed, the arbitrators proceeded with the reference and made an award. All these circumstances show a good award founded upon a parol submission, not upon the deed, but in accordance with its terms; but they would show a bad award if it is to be held as based upon the deed. When the parties themselves, under their hands, extended the time for making the award they had before provided for, *they meant, it must be assumed, something.* What was it? Was it that all they were doing, and all they were putting the arbitrators to do, was an idle or useless proceeding, or was it that they meant to carry on and perfect the business they were professing to transact? It is quite manifest they meant to give effect to their act and writing, and we should therefore construe this declaration so as to carry out the object and intention which they then had. The same deed which they had before them we have now, and we think that deed and the narrative of circumstances following it may be read together as affording a good cause of action upon the substantial agreement of the parties, instead of upon the technicality of a deed."

Lord v. *Lee*, *Evans* v. *Thompson*, Re *Hick et al.*, *Leggett* v. *Finlay*, Re *Tunno et al.*, *Greig* v. *Talbot*, and *Tyerman* v. *Smith*, are cited to show that, "whether the original submissions were by deed or not, an enlargement of the time fixed by it, if not by deed or according to the deed, is nevertheless sufficient to make a good substituted submission, and that all

the terms of the original submission are continued by and incorporated with the new submission so far as they are applicable." These cases seem clearly to show that where by a rule of reference power is given, as here, to enlarge the time, and the arbitrators make their award by inadvertence, without enlarging the time, if by any act of the parties or their attorneys there has been consent, they are estopped from taking advantage of the want of enlargement, and I do not understand there is any discretion with us; I suppose we are bound. And such conduct as lying by and then, after the award has been made, coming forward to get rid of the award, as has been shewn, has been pronounced fraudulent, and there has been no authority shown, and I have no doubt whatever that none can be shewn where such an application as this has been successful. There have been such applications, but none of them have been successful. I am of opinion, therefore, that the rule *nisi*, as well respecting the setting aside of the award as of the rule of reference, should be discharged with costs.

Perhaps I should add that, even supposing the enlargement of time which the arbitrators failed to make, could not be shewn to have been made by the parties, as it has been made by them here through their attorneys, there is no authority for setting aside the award. The Attorney General read authority from *Russell* on this point, and took the ground, (undisputed ground, I think,) that the Court could make the enlargement after the time had expired and after the award was made, and I think nothing could be more reasonable in a case like this. The case of *McCulloch* v. *White*, also cited by counsel, supports this view, and I find nothing to disturb the law there enunciated. In *Lord* v. *Lee*, 3 L. R., Q. B., 404, the arbitrator made his award after the time within which the statute required it to be made, and the question was whether the Court or a Judge afterwards had power to enlarge the same. It was held they had. BLACKBURN, J., said; "It was argued for the defendant that such an enlargement amounted only to the making of a fresh submission, but that is not so, the act having been done under the professed authority of the previous submission; the enlargement is a ratification in the shape of a continuation of the original authority." * * *

The evils of an opposite construction are obvious. Suppose the arbitrator inadvertently to have neglected to enlarge the time, and several meetings to have been held in the interval before the omission is discovered; if the subsequent enlargement of the time had the effect of a new submission, all the witnesses must be recalled, and all the expense must be incurred over again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am, therefore, clearly of opinion that the section gives power to the Judge to enlarge the time for making the award at any time and under any circumstances in which he thinks there is good cause for his intervention, (of course he would not grant an order if he saw that injustice might be done thereby,) and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission.

There was still another ground taken at the argument which would operate, since the want of enlargement by the arbitrators is now held not to be cured by the consent in writing endorsed on the rule of reference. The Attorney General took the position, to cite his words; "that where an award is invalid on this ground, the proper course is to send it back to the arbitrators to make a valid award, and to enlarge the time for making the award for that purpose;" and he cited authorities in support of this contention. No judgment setting aside the award here, it appears to me, could be fairly made without meeting this argument. And when I read the rule of reference in this case, I must confess I want no authority from the books, though I have no difficulty in finding it, to show me the conclusion at which I should arrive. The parties themselves entered into an agreement to meet the very question which has, I regret to say, taken up so much of our time. They have anticipated a dispute by either party as to the validity of this award; and not only so, but their agreement has been made a rule of this Court. These are the words; "And it is further ordered, that in the event of either

of the said parties disputing the validity of the said award so to be made and published, as aforesaid, or moving to set the same aside, the matters hereby referred, or any of them, may be remitted to the consideration of the said arbitrators."

For my part I could not ignore this even if I considered the award invalid, and I think there could be only one ground of refusal by the Court to comply with the terms of this clause of the rule of reference, and that would be improper conduct of the arbitrators.

There is still another reason, it appears to me, for hesitating to make this rule absolute. A doubt has arisen since the argument, whether we have jurisdiction in considering the case, because the rule *nisi* here was by a Judge. Our statute formerly gave authority to a Judge to make a rule *nisi* returnable before this Court. In revising the statutes the attention of the Legislature was manifestly called to the subject, and they have deliberately repealed the statute. If this were a compulsory reference there could be no question, for there power is given to the Judge to grant a rule *nisi*. But as it is not, and as the clause has been omitted from the Revised Statutes, anthorizing the rule *nisi* in this case, we are left to the law, as it stood previously. I did not understand that the point was raised at the argument, but it may be a question of jurisdiction, and, in that case, even the consent of the parties to proceed would not avail, as is shown in the case of *The Queen* v. *Taylor*, in the Supreme Court of Canada, vol. 1, p. 65. I should have much preferred to hear counsel on this point, but as that does not appear to be the view of the Court, I have looked carefully for authority in the old practice, to which alone we are left, for a Judge at Chambers to sign a rule *nisi*, returnable before the Court *in banco*, and without avail, and on this ground alone, however unwillingly, on a mere technical ground, I feel myself compelled to state it as my opinion that the rule *nisi* here of a single Judge cannot be dealt with.

BOWEN *v.* TROOP ET AL.

Rule to set aside a verdict for defendants in an action tried before a Judge without a jury discharged with costs where there was a conflict of testimony on the main question on which plaintiff's right to recover depended, and no clear preponderance of evidence for the plaintiff.

THIS was an action against the defendants for not having effected a good insurance on the plaintiff's vessel,—a vessel trading between the ports of this Province and the United States in coal,—defendants being the agents of the plaintiff for effecting such insurance, and having received considerable sums from time to time. The insurance effected prohibited the vessel from going to ports in Cape Breton for a number of months in the year, in one of which she was lost, and the claim for insurance was resisted. The defendant pleaded a denial, and that there had been a settlement between the parties to the suit. The cause was tried before JAMES, J., without a jury, who gave judgment for the defendant, and a rule *nisi* for a new trial was argued before SIR WILLIAM YOUNG, C. J., DESBARRES, SMITH and JAMES, J J.

SMITH, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This action is brought by plaintiff against defendants for negligence in not having effected insurance on plaintiff's vessel, the "Alvarado," from March 1st, 1870, to March 1st, 1871, in a Nova Scotia office, as he contends they were instructed to do by him as his agents. The defendants deny that any such instructions were given them, and assert that the vessel was insured by them in the United States for the plaintiff, with his knowledge, and after all but one or two Nova Scotia offices had refused to take the risk. The cause was tried before Mr. Justice JAMES at the last sittings of the Supreme Court at Halifax, and judgment was given for the defendant, upon two grounds,—1st. That there was not made out a sufficient case of negligence. 2nd. That the whole transactions of the parties were, subsequently to the alleged cause of action settled between them. A rule *nisi* for a new trial was granted by the learned Judge, and was argued during the present Term.

It will be unnecessary to do more than enquire whether the evidence was of such a character as to justify the decision on the first ground, as it is manifest that this is the real point in question, or rather the only one of importance for our consideration. I should hardly be disposed to think that, if a liability such as is contended for by the plaintiff had been clearly proved to have attached to the defendants, the settlement in proof would have exonerated them. The testimony of the plaintiff is certainly very positive as to the instructions which he asserts he gave Mr. Troop, one of the defendants, with reference to his not insuring the vessel in an American office; but when we refer to the evidence of Peniston, the agent of defendants in New York, who swears to having called plaintiff's attention to the policies covering the vessel, and to the breach of the conditions which had taken place, in connection with the fact of premiums having been charged previously in accounts rendered to defendants for insurances in American offices, we cannot help thinking that, if such evidence is true, the plaintiff must have known and assented to such insurances being effected on his behalf. The testimony is certainly contradicted by the plaintiff, and that of plaintiff on the material question of the instructions to insure is denied by Mr. Troop. With this conflict of evidence upon the main question, the learned Judge was called upon to exercise his functions as a jury would. Is there then such a preponderating weight of evidence in favor of the plaintiff as would justify or call upon this Court to reverse the decision and give a new trial. I do not think there is.

Although it may be unfortunate for the plaintiff that the restrictions in the American policies prevented him from recovering his loss, there does not seem to me to be evidence of that nature which would prevent the learned Judge from concluding that there was not such negligence on the part of the defendants as would render them liable in an action by the plaintiff. They were equally interested with him in effecting insurance on the vessel in as safe an office and on such reasonable conditions as was possible to obtain. The plaintiff was their debtor to a considerable amount, and they were consequently largely interested in the risk, and, moreover, according to Mr. Lewis, they seemed to have made ample efforts to have the

and photographs of the goods and chattels of Joseph R. Jennett, then lately before stolen and carried away by a certain evil-disposed person, he the said Thomas J. Quinn then well knowing the said goods and chattels to have been feloniously stolen.

(Sgd.) M. I. WILKINS,
Prothonotary.

(Sgd.) S. L. SHANNON,
Prosecuting Queen's Counsel.

"The prisoner was found guilty by the jury.

"Before the jury was sworn, as it appears by my minutes, Mr. Motton, one of the counsel for the prisoner, 'objected to the panel as being illegally called, there being no authority in law for the order to summon the same, and also to the addition thereto, the jury last week discharged being the only legal jury for the remainder of the sittings.' He produced no affidavit of the facts at the time, but on the last day of the sittings, being the second day of December instant, the Chief Justice presiding, and all the Judges except the Equity Judge present, he read the affidavit hereunto annexed.* After consultation with the Chief Justice and the other Judges present, I mentioned that we were all of opinion that the question was not then properly before the full Court, but that, regarding the argument as being addressed to myself, I would postpone judgment.

"Objection was taken at the trial, after the jury was sworn, to the indictment, which contains but one count, on the ground that it charged the defendant with having received stolen goods, the property respectively of three different owners; also that although it is charged that the property was stolen, yet there is no direct averment that it was *feloniously* stolen; and that the allegations in the first part of the indictment that the defendant did feloniously receive the goods, and in the concluding part of it that he well knew the said goods and chattels to have been feloniously stolen, are not sufficient. The name of the alleged thief is not mentioned in the indictment, nor is it alleged therein that he is a person to the jurors

* The affidavit of Mr. Motton, referred to in the report of the learned Judge, could not be found on file, but the facts set out in the affidavit appear in the argument and in the judgment of the Court.

unknown. The defendant is still in custody, and judgment and the conviction have been postponed.

"I submit this case, with the affidavit of Mr. Motton, for the opinion of the Court, upon the following points:

"Is the instrument sufficient in law?

"Is it competent for the defendant to take exception to it on the ground mentioned, after he pleaded, and the jury were sworn to try the cause?

"Can the prisoner now, after conviction, legally avail himself of the affidavit of Mr. Motton, and of the facts therein mentioned, the same not having been used or sworn to at or before the trial?

"Under the facts stated and the law, can judgment be legally passed upon the defendant, and be enforced?

(Sgd,) H. McDONALD."

Wallace, on behalf of prisoner.—We take exception to the jury panel in this case. An extra panel was drawn under an order signed by the three Judges only; it should have been signed by all the Judges, or a majority of them. R. S., chapter 92, section 37. See as to a majority of them, R. S., chapter 1, section 7, last sub-section. We contend further that one extra jury was called under section 37, chapter 92, R. S., and was in attendance for a week's time, ready to try causes, but, for some reason, was, at the end of the week, discharged, and a second extra panel called. The powers of the Court to call in an extra panel were exhausted when once exercised. When a challenge is made to the array provision is made for the trial of the challenge; here the Judge appeared to think there was nothing to try.

There were three distinct offences, committed at different times, against three distinct parties, put into the one indictment here in one count. Even if there had been three counts, the Court would have compelled the prosecution to elect one to proceed upon. *1 Taschereau's Crim. Acts of Canada*, 414, citing section 5 of chapter 21 of the Dominion Acts of 1869; *Harris's Crim. Law*, 325, 328. (DESBARRES, J.—Ought not an objection of that kind to have been made before the party pleaded?) No; because this is not a mere formal objection which could have been amended on being taken exception to.

If the indictment had been in several counts it could have been amended by abandoning all but one. *2 Taschereau*, 171, 172. The indictment does not even state that the goods were "feloniously" stolen. See section 100 of the Dominion Act of 1869, chapter 21, *Taschereau*, 607. The prosecution were bound to allege what they were bound to prove in order to convict. We were anxious to have the advantage of the contention that there was no sufficient evidence to convict the accused here. (DESBARRES, J.—We cannot touch that.)

Shannon, Q. C., contra.—It is a question if the exception taken to the jury is not taken too late, as it was not taken in proper form at the trial. The contention as to the number of Judges is met by another clause of the same section of the Interpretation Act already cited, which says that words used in the plural number may mean one. When chapter 92 says "the Judges," it means any of the Judges. It does not give the power to the Judges "jointly." There is nothing in the chapter to restrict the power of the Judges to drawing one extra panel. Section 10 of chapter 1 R. S. says that where power is given to make by-laws, regulations, rules or orders, it shall include the power to amend or modify such by-laws, rules or orders and make others. The exigencies of the case may require such orders.

This objection is too late; a case can be reserved only upon the record. *Roscoe's Crim. Evid.*, 219, 208. This objection does not appear upon the record. No evidence of the improper constitution of the jury was given. *Archbold's Crim. Law*, 159–161, shews that a challenge must be made before a juryman is sworn, and must be in writing, so as to go upon the record. The objection here was only verbal.

The first objection to the indictment is that the defendant is charged with having received stolen goods, the property of three different owners. But it is not alleged that there were three different receivings. It is only the one receiving that is alleged. Suppose, however, that there had been three distinct receivings, knowing the goods to have been stolen from three distinct persons, and that the indictment had been so framed, the Court would have directed us to elect, or, if the objection had been taken before the trial, the indictment would have

been amended. *1 Taylor on Evidence*, sec. 330; *Reg.* v. *Dunn*, 1 Moody's C. C., 146; *Reg.* v. *Hinley*, 2 Moody & Rob., 524; *Taylor on Evidence*, section 765; *Reg.* v. *Blezedale*, 2 Car. & Kir., 765; *Reg.* v. *Ellis*, 6 B. & C., 145; *The Queen* v. *Firth*, 38 L. J., Mag. Cas., 54. If there were three distinct felonies charged, the prosecution should have been called on to elect, and it is too late to take the objection now. The Act of 1869, chapter 29, section 79, shews that the difficulty, if any, is obviated by the verdict. As to the objection that the word *feloniously* is not used before the word stolen, it is too late to take that objection after pleading. Under the English law, *Archbold's Criminal Statutes*, page 197, gives the English statute, which is different from ours. See section 32 of chapter 29 of the Acts of 1869, which refers to defects; every defect apparent on the face must be taken by demurrer or motion to quash the indictment and not afterwards, and, further it may be amended. The corresponding provision of the English statute refers only to *formal* defects. Ours goes further and extends the curative power to any defect appearing upon the face. See also chapter 29 of 1869, section 27. Even if the defect were a serious one, it is aided by verdict. *Archbold's Criminal Law*, 65; *L. R., 8 Q. B.*, 102; *42 L. J.*, 94.

Motton, in reply.—No time having been limited for the attendance of the first extra jurors, they were bound to be here during the whole Term. The jury was drawn for the remainder of the sittings, and that jury should have tried the cause. The panel was not properly drawn. The statute provides that the Judges should draw the panel. This panel was drawn by a single Judge. But for section 37 the Judges would have no power to draw a panel of jurors. That section empowers the "Judges" to do it, and the interpretation clause provides that when joint authority is given to three or more a majority can exercise it. The order here should have been made by a majority of the Judges. Any other construction would be opposed to the manifest intention of the Legislature and repugnant to the context. See section 7 of the Interpretation Act. As to the contention of the Crown Counsel that the defect is cured by verdict, one of the strongest cases cited refers to a misdemeanor. The statute making the receiving of goods a felony only makes it a felony where the goods received are

feloniously stolen. It is not charged that they were feloniously stolen. Therefore there is really no felony charged in the indictment. *Canada Criminal Act of 1869; 2 Tasch.*, 356; *Clarke's Crim. Law*, 352.

Wallace cites *U. C., 28 Q. B.*, 2; *2 Tasch.*, 21.

DESBARRES, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This case was tried before Mr. Justice McDonald on the 29th day of November last on an indictment found by the Grand Jury of this County against the defendant, which is in the following words:

"IN THE SUPREME COURT, 1878.

"HALIFAX, SS.

"The jurors for our Sovereign Lady the Queen upon their oath present that Thomas J. Quinn, in the months of May and April in the year of our Lord one thousand eight hundred and seventy-eight, at Halifax, in the county of Halifax, feloniously did receive one pair of boots of the goods and chattels of William Humphrey; three fishing rods, some knives and forks, and a pair of boots of the goods and chattels of Aylmer F. Cameron, and a quantity of silver-ware, clothing, boots and shoes, books and photographs, of Joseph R. Jennett, then lately before stolen and carried away by a certain evil disposed person, he the said Thomas J. Quinn, then well knowing the said goods and chattels to have been feloniously stolen."

The defendant pleaded not guilty, and was convicted of the offence charged in the indictment, but no sentence was passed upon him in consequence of a motion made before the said Judge by Mr. Motton, the defendant's counsel, in arrest of judgment. The learned Judge having submitted the case, together with the objections raised before him therein, for the consideration of the full Court, it was argued before us during the present term by Mr. Motton and Mr. Wallace for the defendant and by Mr. Shannon, the prosecuting officer, for the crown. Three objections were taken before us at the argument by defendant's counsel;—1st. That the order made by three of the Judges of this Court for drawing an extra

panel of petit jurors for the trial of civil and criminal causes was an illegal order, not having been signed by a majority of the Judges. 2nd. That the indictment is bad in law, inasmuch as it charges the defendant with having received certain goods which are not alleged to have been feloniously stolen from any person. 3rd. That there are three different offences charged in the indictment as having been committed by defendant on different occasions.

The first objection depends on the construction to be put on section 37 of chapter 92, Revised Statutes, which enacts as follows; "The Judges shall have power to direct that an extra panel of petit jurors shall be drawn at any sittings in Halifax before a Judge in open Court in the manner hereinbefore appointed, who shall be summoned for, and bound to attend at such time and for such period as shall be prescribed in the order thereof; and who shall be subject to the same fines for non-attendance, and be entitled to the same fees and compensation as are provided in respect of other petit jurors: and such extra jurors shall be competent to try both civil and criminal causes under the direction of the Judges." This section does not say that a majority of the Judges shall direct an extra panel of petit jurors to be drawn; it merely empowers the Judges in general terms to direct this very simple act to be performed, without saying that it shall be done by one, two, three or more of them, as it would not have done had it been the intention of the legislature that it should be performed by a fixed number constituting a majority. Had it been so worded it would have been a most unreasonable requirement, subjecting the Judges to great trouble and inconvenience by meeting together for such a purpose as this. Can it be supposed that the legislature ever intended that this section of the Act referred to should be so interpreted as to require four, or a majority of the Judges, to perform a duty here which a Judge on circuit has the power of performing singly in every county in Nova Scotia. I cannot for a moment imagine that the imposition of a duty so uncalled for was ever contemplated. But it is contended that section 37 must be so interpreted because section 7 of chapter 1, R. S., declares "that all words purporting to give a joint authority to three or more persons shall be construed as

giving authority to a majority of such persons." I am decidedly of opinion that this latter section was never intended to apply to or control, and that it does not apply to, and cannot control the Judges in the discharge of their judicial duties. It was, I take it, intended to apply to cases where three or more persons were jointly empowered to perform some specific act; such act might be performed by a majority of such persons. In the present case the order for an extra panel was signed by three of the Judges, but if it had been signed by two only I think it would have been a valid order, and a full compliance with the requirement of section 37, chap. 92, of the Revised Statutes, 4th series.

As to the second objection, I may say that it was hardly denied by the learned counsel on the part of the Crown that the indictment was defective in form, but the question is, whether, assuming it to be so, the defendant is now in a position to avail himself of the defect in the indictment after pleading to it, and choosing to run the risk of a trial which has resulted in his conviction. Section 32, chapter 29, of the Dominion Acts, 32 & 33 Vic., enacts that "every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterward; and every court before which any such objection is taken may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this act." The language of this section is very plain, and, as the defendant did not think fit to follow the only course open to him by demurrer or moving to quash the indictment, but preferred pleading to it, and going to trial under it, I think he is now precluded from moving the court in arrest of judgment, for the defect appeared on the face of the indictment. This defect must have been observed by the defendant's counsel, who, knowing that if the course suggested had been adopted an amendment would doubtless have been allowed, may have thought it best to hazard a trial upon it as

was. Judge TASCHEREAU, in his work on Criminal Law, at page 169, vol. 2, points out the distinction between section 32, chap. 29 of the Canadian Act of 1869, and section 25, chap. 100, of the Imperial Act, 14 & 15 Vic., from which it was taken, the latter applying only to *formal* defects, the former to *any* defect apparent on the face of the indictment. At page 170 he says; "It is hardly to be believed that it was the intention of the framers of our act to extend the provisions of section 32 of that act to any defect on the face of the indictment;" although these are the very words of that section, which are not, as in the English Act, applicable to formal defects, only. And at page 171, he says; "A motion for arrest of judgment will always avail to the defendant for defects on the face of the indictment, when these defects are such that thereby no offence in law appears charged against the defendant. Such an indictment cannot be aided by verdict, nor can it be cured by verdict." In support of this view he cites *Regina* v. *Waters*, 1 Den., 359, in which it is said; "There is a difference between an indictment that is bad for charging an act which, as laid, is no crime, and an indictment which is bad for charging a crime defectively: the latter may be aided by verdict, the former cannot." There can be no doubt that an indictment for an act not punishable in law would be incurable as well after verdict as before; but it is not so clear to my mind as it is to that of the learned author that section 32 of chapter 29 of the Dominion Act of 1869 was meant, and must be interpreted to apply to formal defects only. I am inclined to think the words of that clause make it applicable to all defects apparent on the face of the indictment, and regard the omission of the words, "for any formal defect," used in the English clause, as a very significant fact to shew that it was intended to have a more extensive operation than he is willing to give it. But, whatever may be that effect, it is clear that according to the case of *Reg.* v. *Waters*, the defect in the indictment in this case is aided by the verdict, the defendant having been charged with a crime defectively set forth therein.

The case of *The Queen* v. *Goldsmith*, 42 Law Journal, 94, has a very important bearing upon, and is, in my view, decisive of this point. That was a case for receiving goods, knowing them

to have been unlawfully obtained by false pretences. An objection was taken before plea to two counts in the indictment, but issue was joined on the plea of not guilty. The objection was that the two counts in the indictment were bad because they did not set forth the false pretences by means of which the goods had been obtained, and that, consequently, it did not appear that the false pretences were within the statute. The objection was taken before the Recorder, but he did not quash the indictment and reserved the point, not as to whether he ought to quash, but as to whether the count was a good one or not. BOVILL, C. J., said; "The objection, it is true, was taken before verdict, but we can only give effect to it as if taken after verdict. The Judge could have given no effect to it except by quashing the indictment or by arresting the judgment. We must therefore treat it as a motion made in arrest of judgment after verdict." BRAMWELL, B., says; "The objection is that the indictment shows no offence. I think the objection was taken at the wrong time. The prisoner was given in charge to the jury. The objection ought to have been taken by demurrer, or on motion to quash the indictment, or in arrest of judgment. If it had been taken on demurrer, or on motion to quash the indictment, I am not prepared to say that the count is good, but, upon principle, this defect was cured by verdict." The conviction was affirmed by the unanimous opinion of the whole Court.

The third objection was not relied upon at the argument. If there be anything in it, which is exceedingly doubtful, it is like the second, aided by the verdict, and cannot now prevail. See the case of *The King* v. *Dunn*, 1 Moody's C. C., 146, bearing on this point, the ruling in which will be found to set this objection entirely at rest. I am of opinion that the conviction of the defendant in this case must be affirmed.

The cause was tried at Halifax, in April, 1878, before Mr. Justice DESBARRES, (without a jury,) who gave judgment in favor of plaintiff. The rule *nisi* to set the judgment aside was argued March 31st, 1879, before SIR W. YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, J J.

Rigby, Q. C., in support of rule.—It is now held that persons who would otherwise be common carriers, may, by special contract, change their character, so as to be liable only as ordinary bailees. *8 M. & W.*, 443; *2 C. B., N. S.*, 156. The carrier of course would still, we admit, be liable for gross negligence, and that is the contention raised here by the plaintiff. It is held also that the *onus* of proof of this negligence is on the plaintiff. *L. R., 3 C. P.*, 18. There it was laid down that the proof of injury must be supplemented by proof of gross negligence. There is not a replication except of *gross* negligence or *wilful* default. Cites *Brown on Carriers*, 8, 17; *Fish. Ann. Dig.*, (1874,) p. 72; *29 L. T. R., N. S.*, 422. There is no evidence here of negligence on the part of defendants. The evidence shews that the goods were put in the warehouse at Richmond in good order. The Judge, sitting as a jury, has found that the negligence consisted in discharging and conveying the goods to a building on the Railway Wharf in rainy weather. There is no evidence to sustain that finding. The evidence is that they were removed in fine weather, and that the injury was caused while they were in the warehouse at Richmond by the drip from the roof. There is positive testimony, uncontradicted, that the rain did not commence until daylight, and the evidence shews that the goods were taken from the ship and put in the shed at midnight. Was it negligence in defendants putting the goods in that shed? It was the shed provided by the Government for goods landed on that wharf.

Meagher, contra.—The cases cited do not require *gross* negligence on the part of defendants to make them liable. Some of the Judges, in delivering judgment in those cases, carefully abstain from using the word *gross*, while those who use the term do not base their judgments upon the distinction. There is really but a very vague distinction between negligence and gross negligence. The evidence here shewing that the goods were wet with fresh water before delivery raises a

presumption of negligence. *L. R., 3 C. P.*, 18. There is evidence here that it was raining when the goods were taken from the lighter at Corbett's Wharf. There is positive testimony that the goods were being removed from the ship in the morning, when it was raining It is unreasonable to suppose that the drip through the roof was sufficient to damage the sixty-two bundles injured here as this iron was injured. The liability of the defendants as common carriers, *i. e.*, as insurers, was renewed when they put the goods off the vessel at Richmond, and lasted until the delivery to plaintiff at Corbett's Wharf.

Graham follows.—There is evidence here to support the Judge's finding, which was for damage caused by rain while landing the goods, and during all the time till delivered. Even if the finding does not cover the whole period, we contend that the conclusion, his finding for plaintiff to the amount of $240, was correct, and that there is evidence to support that finding. As to the proper place of delivery, see *1 Kay on Shipping*, 350. (WEATHERBE, J.—The bill of lading seems to provide that the goods shall be delivered to the consignee at Halifax, who is to take delivery from alongside the ship, or, in default of such delivery, that the owners of the vessel will put the goods in one or other of two places.) They must be driven to one position or the other, either that the contract ended by the landing at the Railway Wharf, or by the delivery at Corbett's Wharf. Cites *1 El. & B.*, 743; *Addison on Contracts*, 736; *Brown on Carriers*, 202–4.

Thomson, Q. C., in reply.—*Wylde* v. *Pickford*, decided that carriers could limit their liability; *Phillips* v. *Clark* decided that contracts like the bill of lading here do not relieve the carriers from liability for loss caused by their own negligence. *Orloff* v. *Briskof*, L. R., 1 P. C., 238, shews that the plaintiff must give clear evidence of negligence. In *Czech* v. *General Steam Navigation Co.*, L. R., 3 C. P., 18, negligence was presumed because the goods, being injured by oil, and there being no oil in the cargo, it was evident that the goods must have been injured by the negligent manner of oiling the machinery of the vessel by defendant's servants.

There is nothing unreasonable in supposing that the drip caused the injury. Drops of water falling twenty or thirty

feet from a roof upon elastic sheets of iron would splash over a considerable area, and rust a great deal of iron. There is no evidence here of a usage of the City of Halifax to the effect that goods were not landed at the Railway Wharf. There was no plea of such a usage. There is nothing in the contract here to prevent defendants putting these goods on a wharf in a warehouse for a temporary purpose, and then conveying and delivering them to the consignee. The contract here allows us to land these goods immediately on arrival at the Port of Halifax, anywhere in the port, unless a custom is proved to land in a particular place and manner. The contract is intended to allow defendants to land the goods at midnight, if necessary, as was done here, and warehouse them, as was done here. (DESBARRES, J.—There might be something in that if they had left them there, but they took them out to deliver them to plaintiff. YOUNG, C. J.—Was the putting in that warehouse a delivery?) Well, there is no evidence of negligence in putting the goods into a shed apparently tight.

SIR WILLIAM YOUNG, C. J., now, (March 31st, 1879,) delivered the judgment of the Court:—

The plaintiff was the consignee of one hundred bundles of sheet iron, shipped under a bill of lading dated 10th November, 1876, in the steamship "Dominion," owned by the defendants and bound for this port. On arrival, she proceeded to the Railway Wharf to land goods for the Upper Provinces, and to get at those it was necessary to land the iron, which was deposited in a shed, said to be dry and clean. It came out of the ship in good order, and was sent down by the agent of the ship, in a lighter hired for the purpose, to Corbett's Wharf. It sustained no injury in the lighter, but had been damaged by fresh water either on the Railway Wharf or in the shed. On a survey and sale it was found that the loss amounted to $169, for which the action was brought. The Judge by whom it was tried, without a jury, awarded that sum to the plaintiff, and the question is whether the defendants are liable. The exceptions in the bill of lading are as follows:—

"The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters or mariners, restraints of Princes, rulers or people, loss or damage resulting from insuf-

examination, and although this evidence could not have been received if objected to, no objection to it appears in the Judge's minutes.

These being the facts, let us now look into the law, which was fully gone into at the argument. The first inquiry is, when were the defendants bound to land these goods? Did the landing at the Railway Wharf discharge them of liability under the bill of lading? The rules as to the delivery of goods carried by sea are laid down in all the text-books,—in *Abbott on Shipping*, 378; *Kay on Shipping*, 350, and, more fully than in either, in *Parsons on Shipping and Admiralty*, Book 1, chapter 7, section 5. They must be delivered at the proper time, in the proper way, and at the proper place. With respect to goods coming from a foreign country, it was said by Mr. Justice BULLER, in *Hyde* v. *Trent and Mersey Company*, 5 T. R., 389, that the bill of lading was only an undertaking to carry from port to port, and that, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the master. In *the brig "Fitcher,"* U. S. D. C., 1866, (*Parsons, supra*, 223,) it was held that the delivery must be in accordance with the usage, and that, except in some particular trades, the consignees had the right to order the master to go to any wharf they pleased, and that, if no orders were given, he could select a wharf. A rule also is stated when there are several consignees. The reasonable convenience of the consignees, or of the majority in value, is always to be consulted. It was ingeniously suggested at the argument that a landing at the Railway Wharf, being within the port, was enough, there being no evidence of usage on the minutes, but it must be recollected that the trial took place in Halifax, with the capacities and position of the harbor known to every one, and taken for granted as known. As regards the Court, I agree with Judge COLERIDGE where he says that Judges are not necessarily to be ignorant in Court of what every one else in Court and they themselves are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early times; *22 E. L. & E.*, 197. The defendants, besides, have shewn by their reference in the bill of lading to the company's wharf, and by their act in employing a lighter to bring the goods down to Corbett's Wharf, incurring a liability, according

to *Morewood* v. *Pollok*, 18 E. L. & E., 341, for any negligence therein, that they neither intended nor claimed the delivery at the Railway Wharf to be a discharge.

The goods, then, were damaged by rain before their discharge, and the next and most material question arises on the effect of the exemption from liability in the bill of lading from loss by rain. It is to be observed that this is not one of the perils for which exemption is claimed, though arising from the negligence, default, or error in judgment of the employees of the ship. The two cases, therefore, cited by the defendants' counsel at the trial, as well as at the argument, apply. In *Phillips* v. *Clark*, 2 C. B., N. S., 156, in 1854, where the bill of lading provided that the defendant should not be accountable for leakage or breakage, the Court held that this was intended only to exempt him from his common law liability, and not from responsibility for damages resulting from negligence, nor from the obligation which the law imposed upon him to take reasonable care of the goods entrusted to him. In *Lee* v. *Dudgeon*, 17 L. T. R., N. S., 145, and in *Czech* v. *General Steam Navigation Company*, same volume and year, 247, this doctrine was upheld, and the liability of the shipowner for negligence or gross negligence, notwithstanding the exemptions in the bill of lading was affirmed. In these two cases WILLES, J., observed that the same doctrine is laid down by the early writers, and in some of the modern codes. It is recognized also by the Lord Justice TURNER, in *Ohrloff* v. *Briscall*, L. R., 1 P. C., 238; *14 L. T. R., N. S.*, 873, in which last report the judgment of Dr. LUSHINGTON, appealed from, is contained. The memorandum in the bill of lading, it was held, protects the shipowners as to all leakage except that caused by negligence. It must be culpable negligence and not mere ignorance of the shipowners that creates the liability. The cases of *Gatliffe* v. *Bourne*, 4 Bing. N. C., 329, and *Cargo* v. *Argos*, L. R., 5 P. C., 134, are also worthy of note. In these cases the terms negligence and gross negligence are used as synonomous, and the distinction suggested at the argument cannot be maintained. Campbell, in his *Law of Negligence*, page 11, observes that the importation of the term "gross" into cases of contract is absurd and misleading. So also in *Hinton* v. *Dibbin*, 2 Q. B., 854, Lord DENMAN remarks that the term has no definite meaning, and that it

may be doubted whether between gross negligence and negligence merely any intelligible distinction exists.

Here the goods that were landed in perfect order from the ship, while in the custody of the master and before their delivery to the consignee were greatly deteriorated. They were landed of necessity it may be, and for an excusable or legal purpose, but to the injury of the plaintiff, and for which he ought not to suffer. What the extent or nature of the injury by rain from which the bill of lading exempts the shipowners, I shall not attempt to define, but in my opinion it does not cover an injury to goods requiring to be delicately handled, and exposed to wet, whether in the act of landing or from the drippings of a shed over which the plaintiff had no control. I think, therefore, he is entitled to our judgment, and that the rule for a new trial should be discharged with costs.

WEATHERBE, J., read the following dissentient opinion:—

The bill of lading which we are called upon to construe contains the following language:—

"Shipped, in good order and well-conditioned, by Robert Crooks & Co., in and upon the steamship called the *Dominion*, whereof ——— is master for the present voyage, or whoever else may go as master in the said ship, and now lying in the port of Liverpool, and bound for Halifax, one hundred bundles sheet iron, being marked and numbered as in the margin, and are to be delivered from the ship's deck, (where the shipowners responsibility shall cease), in the like good order and well-conditioned at the foresaid port of Halifax; (the act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters or mariners, restraints of princes, rulers or people, *loss or damage resulting from insufficiency in strength of package, from sweating, leakage, breakage; rust, decay, frost, rain*, injury to or soiling of wrappers or packages, *however caused*, or from stowage, or contact with, or smell or evaporation or taint from other goods, or from any of the following perils, whether arising from the negligence, default or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever, excepted,—namely, risk of craft, explosion, or fire at sea, in craft, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury

thereto, however such damage or injury may be caused, collision, stranding, or other peril of the seas, rivers, or navigation, of what nature and kind soever, and howsoever such collision, stranding, or other peril may be caused, with liberty in the event of said steamer putting back to Liverpool, or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer, and with liberty to sail with or without pilots, and to tow and assist vessels in all situations,) unto William Robertson, Esq., or to his assigns, freight for the said goods being paid at Halifax as per margin, with primage and average accustomed. In witness whereof the agents of the said ship have affirmed to two bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Freight if payable in Halifax to be paid at the current rate of exchange for banker's bills at sight, on the day of the ship's arrival. Weight, contents, quality, condition, quantity, brand and value unknown, and the ship-owner not accountable for same. The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury in the warehouse provided for that purpose on the Company's wharf at Halifax, or sent to the public store as the Collector at the port of Halifax shall direct, and when deposited in the warehouse to be subject to storage, the Collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

The undertaking is to deliver the goods in the port of Halifax *from the ship's deck*, where the ship-owner's responsibility shall cease. There is no agreement to land the goods at any wharf, and it is also mutually agreed by the parties that loss or damage from rust, decay, and rain, however caused, shall not render the owner liable.

The parties contemplating, it would appear, the difficulty which arose here,—the inconvenience to the consignee of receiving the goods from the ship's deck in an inconvenient place in the port of Halifax,—further expressly agree that if the consignee should not be ready "alongside" to take the goods immediately

the vessel is ready to discharge, the goods are to be landed by the master and deposited at the expense of the consignee at his risk of fire, loss or injury in the warehouse provided for that purpose on the company's wharf at Halifax. The goods were safely conveyed to the port of Halifax, and the ship was discharged in this port at the Government Railway wharf. The consignee did not take the goods from alongside the ship when she was ready to discharge, and they were, in accordance with the contract, landed by the master and deposited in the warehouse provided for that purpose on the Company's wharf, where they were delivered to the consignee. There is nothing in the bill of lading to limit the ship-owner as to the place in the port of Halifax at which the goods are to be landed before being deposited in the warehouse provided for that purpose.

There is evidence that the goods were damaged by rust from rain, and the learned Judge who tried the cause has found that this happened in discharging the goods and removing them to the railway shed on the wharf where they were landed previous to their being conveyed to and deposited in the warehouse provided by the Company. I thought this rain which caused the damage was one of the very exceptions mentioned in the bill of lading.

Something was said about the unreasonableness of requiring the consignee to receive this one hundred bundles of sheet iron during the rain, and it was asked in reply whether the ship was to remain at this intermediate port, at a great expense, for fine weather. I submit we have not to consider these questions. The parties have agreed among themselves, and the consignee, I thought, if he required the goods to be kept dry, should have been ready alongside to receive them immediately on their being landed, or he should have taken the means to protect them.

The cases cited on the argument do not, I think, assist us, because they apply to cases where the very matter in dispute was not expressly settled by the agreement, as it seems to me to be concluded here.

There was another reason, irrespective of the construction of the language of the bill of lading, why the verdict should be set aside. The learned Judge who tried the cause, in his decision in writing before us, supports his finding for the

aintiff on the ground that the iron was damaged in being nded. There appeared to me to be no legal evidence whatever support that; but we were asked to sustain the verdict cause, at any rate, there was evidence that the damage was casioned at another time and another place, viz., from the ip of rain in the shed. This might be heard if we had wer to find a verdict, but the Act does not, I think, give us y such power. We have merely to enquire whether this rdict can be sustained on the grounds upon which it has en found, and I am opinion that it cannot.

DOMVILLE *v.* DAVIES ET AL.

Action was brought on a bill of exchange drawn by defendants. The bill, with the acceptance, was proved and read without objection, when plaintiff rested, whereupon defendant ved for nonsuit on the ground that there was no evidence of stamping, and because of an eration unexplained on the face of the bill. Plaintiff was then recalled, and gave evidence as ouble stamping and cancellation. Defendant gave evidence as to the alteration in the bill, ending that the date had been altered from 27th August to 17th August. After plaintiff been called to rebut, the Judge proposed to submit to the jury the view that if the plaintiff received the bill from the acceptors he would be entitled to recover, (because it would mpossible for the alteration to have taken place after the bill had left defendant's hands and re it reached the plaintiff and became an available bill,) but if from the defendants he d not. Plaintiff's counsel then said he would submit to a nonsuit, and the Judge gave n rule to set it aside.

***Held*, that the view which the Judge had proposed to submit to the jury was incorrect, plaintiff was not precluded from moving to set the nonsuit aside, and that the evidence as lteration of the date and cancellation of the stamps was for the jury.**

THIS was an action on a bill of exchange drawn by defendts and accepted by E. C. Davies & Co. The bill with the ceptance was proved and read without objection, and plainf rested; whereupon defendant moved for nonsuit on the ound that there was no evidence of stamping, and that ere was an alteration in the date from the 27th to the 17th August apparent on the face of the bill and unexplained. aintiff was then recalled and proved double stamping by rties managing plaintiff's business under warrant of attory. The defendants then gave evidence as to the alteration the bill. The learned Judge expressed the opinion that if e plaintiff had received the bill from the acceptors he would entitled to recover because it would be impossible for the eration to have taken place after the bill had left the fendant's hands and before it reached the plaintiff and

became an available bill, but if he received it from the defendants he could not recover. His Lordship proposed to submit this view to the jury, when plaintiff's counsel said he would submit to a nonsuit, and the Judge gave him a rule to set the nonsuit aside, which was argued this term before McDONALD, SMITH, JAMES and WEATHERBE, JJ.

Graham for rule.—E. C. Davies & Co. purchased goods from plaintiff who wanted security, and this bill was given. E. C. Davies wrote the bill and sent it to W. H. Davies & Sons. It must have been altered in E. C. Davies & Co.'s hands. If so it is not void because the bill was not issued. The bill came into Domville's hands as it now stands. There is a presumption that the bill came back to E. C. Davies & Co. for acceptance to be forwarded to Domville. If there was any alteration apparent on the face it might be incumbent on us to explain it.

There is no evidence on the face of the instrument that there has been an alteration in the note. *2 Daniel on Neg. Inst.*, 373. On the minutes, the evidence of defendant is not conclusive at all that there has been an alteration. He simply says, the note I signed was the 27th. He does not say that this bill is not in the condition it was in when he signed it. The evidence of Davies amounts to nothing. He says in his evidence that the note was 27th, but he had previously admitted, after looking at his bill book, that this was a mistake.

Where the alteration is not apparent on the face, the burden of proving is on the party alleging. *2 Daniel on Neg. Inst.*, 376; *2 M. & G.*, 890. Where a note is drawn carelessly so that there may be an alteration in it, a *bona fide* holder can recover on it; *4 Bing.*, 253; *2 Daniel on Neg. Inst.*, 1405, p. 364. Here it was negligence to make a "2" so that it could be covered by a "1," (if it ever was a "2,") *2 Taylor*, p. 1513; *1 M. & M.*, 116.

Rigby, Q. C., contra.—The plaintiff here having been nonsuited voluntarily, and not in deference to the opinion of the Judge cannot move to set it aside. After the bill was proved defendant's counsel moved for nonsuit on two grounds, one of which was the insufficiency of stamping. That was the only

nonsuit moved for. Afterwards the position was changed as far as the stamps were concerned. Domville was recalled as to the stamps, and the position of the plaintiff materially changed on that point. There was also new evidence as to the date and alteration, as to which Domville was recalled. Defendant after that made no new motion as to nonsuit, and the Judge, even admitting that he had doubts as to the law, was about to leave the facts to the jury, when plaintiff, preferring that course, took a nonsuit. The motion to set aside a nonsuit is to overrule any ruling of the Judge. There is no ruling of the Judge here. *1 Taunt.*, 10; *2 Bing. N. C.*, 467; *9 Dowl. P. C.*, 181; *1 U. C. Q. B.*, 451; *3 U. C. Q. B.*, 332; *13 U. C. C. P.*, 386; *3 Kerr, N. B.*, 339.

The Judge, after the conclusion of the evidence, said it would be more satisfactory if there was certain evidence there which was not before the Court, but that he would leave it to the jury, whereupon the plaintiff became nonsuit. The difficulty suggested by the Judge was a lack of evidence. The Court cannot help him in respect to that. He could only be aided by another trial. The nonsuit must be sustained on the question of stamping. There is one 30 cent stamp on the note not obliterated. The double stamping is by initials of persons not parties to the note. It is erased by J. Domville's initials *per* J. S., (Scovill;) and J. S., (Skead), two of three persons having power of attorney to manage his business, but before Domville knew there was anything defective in the stamps; and the power of attorney was never put in, although evidence was allowed to be given of it, (unobjected to,) and that two of the three had power to act for the three. There is no evidence that the two stamps on the note were put on as soon as the attorneys had knowledge of the defective stamping. There was interest due on the note, and therefore the stamping should have been for a larger amount.

There is an alteration apparent on the face of the note, and the two parties who knew anything about it swore that it had been altered. Therefore there was nothing to go to the jury. The letter in which defendants, after getting notice of the note on the 17th, said there must be a mistake and that they must be wrong, proves nothing. They then assumed that the note was, as a matter of fact, the 17th, and that there

was no alteration on the face. After seeing the note, and finding that it had been altered, their recollection, which coincided with the bill book was confirmed.

Graham in reply.—The inference from the fact of the Judge granting a rule to set the nonsuit aside is that the nonsuit was taken in deference to his opinion, with the full intention that there should be a rule. *Alexander* v. *Barker*, 2 Cr. & J., 136, (BAYLEY, B's observations); *3 M. & G.*, 452; *5 M. & G.*, 590; *L. R.*, 9 *Q. B.*, 125.

The note here was double stamped as soon as Domville had knowledge. It cannot be required that the note should be stamped where the agent had knowledge.

The question of cancellation is not raised by the pleas. Affixing the stamps is one thing and cancelling is another. The plea is that the note was not duly stamped. That is a pure question of law. A fact should be pleaded. The objection should have been taken to the admissibility of the note. The note went in without objection.

WEATHERBE, J., now, (March 31st, 1879,) delivered the judgment of the Court:—

This was an action by the payee of a bill drawn on E. C. Davies & Co. by defendants. The bill with the acceptance of E. C. Davies & Co. was proved and read without objection at the trial in Pictou, when plaintiff rested; whereupon defendant's counsel moved for nonsuit on the ground that there was no evidence of stamping, and because of an alteration unexplained on the face of the bill. The plaintiff was recalled and proved that the initials appearing on the face of stamps for double the amount required for a note of $1000, which had been placed on the note before plaintiff was aware of defective stamping or defacing by two of three persons who managed plaintiff's business, who held a power of attorney by which any act of two was sufficient. This evidence was received without objection. The two defendants gave evidence as to the alteration in the date of the bill, which was declared on as of the 17th August, and which they contended had been altered from the 27th. A letter was read on the trial from defendants, admitting they had the bill entered in their book by mistake for the 27th, promising to

pay and asking for time. After the defendant rested and plaintiff had been recalled to rebut, the learned Judge suggested that it would have been more satisfactory if the evidence had shown whether plaintiff had actually received the bill from the defendants, who were the drawers, or from the acceptors, and expressed an opinion that if from the acceptors plaintiff would be entitled to recover, because it would be be impossible for the alteration to have taken place after the bill had left defendants' hands and before it reached the plaintiff and became an available bill, but if he received it from the defendants plaintiff could not recover. This view the Judge proposed to submit to the jury, when plaintiff's counsel said he would submit to a nonsuit, and the learned Judge gave him a rule *nisi* to set the same aside. The learned Judge agrees with the rest of us that this view was not correct. Defendants' counsel now contend that this nonsuit cannot be disturbed, because it was voluntarily accepted by the plaintiff's counsel, and a number of cases were cited on the argument in support of that position.

In *Kindred* v. *Bage*, 1 Taunt., 10, the Court interposed on the argument to enquire whether counsel for plaintiff desired the case to be submitted to the jury, and because he did not thought they could not in fairness accede to the application for nonsuit. In *Alexander* v. *Barker*, 2 C. & J., 133, it was held that where the Judge stated that if the case went to the jury he would express a certain opinion, which the Court thought incorrect, plaintiff was not precluded from taking the objection. In *Simpson* v. *Clayton*, 2 Bing., N. C., 467, the Judge was summing up the case when plaintiff's counsel interposing without effect to obtain a direction more favorable to plaintiff, elected to be nonsuited. The Judge was held not to have been wrong in his direction, and because the nonsuit took place at the instance of plaintiff's counsel, it would not be disturbed. The under sheriff in the case of *Barnes* v. *Whiteman*, 9 Dowl. P. C., 181, on the trial thought plaintiff only entitled to nominal damages, but was willing to let the case go to the Jury. Plaintiff's counsel requested it to be left to the jury, and, when defendant's counsel was on the point of addressing the jury, elected to be nonsuited, and because he elected he was held to be without a remedy. It

was held in *Sweet* v. *Lee*, 3 M. & G., 453, that by submitting to a nonsuit not spontaneously but in deference to the Judge, a plaintiff is not precluded from moving, and in *Stuart* v. *Bullen*, 1 U. C. Q. B., 451, on the trial a nonsuit was moved for, and leave reserved, and afterwards, while the Judge was charging the jury, the plaintiff elected to be nonsuited; and in delivering judgment refusing to disturb the non-suit, ROBINSON, C. J., said; "If upon the Judge urging a nonsuit plaintiff had merely assented or forborne to oppose the desire or opinion of the Court it would have been otherwise."

In *Wilkinson* v. *Whatley*, 5 M. & G., 590, plaintiff's counsel interrupted the summing up, conceiving that there was misdirection of law. The Court allowed him to move to set aside the nonsuit, under the doctrine that wherever the Judge misdirects the jury on a point of law, and plaintiff elects to be nonsuited, he can afterwards move. In this case CRESWELL, J., expressed doubts whether the doctrine had not been carried a little too far. *Thorne* v. *Bedell*, 3 Kerr, N. B., 339, was a case in the Supreme Court of New Brunswick relied on at the argument, but there, on the trial, the plaintiff in opening discovered a mistake as to the filing of the record and voluntarily accepted a nonsuit. He afterwards moved on affidavit and failed, and the case does not, I think, assist us. *McGrath* v. *Cox*, reported in 3 U. C. Q. B., 333, was an action of libel. Evidence of publication was on the trial ruled to be insufficient, upon which the plaintiff accepted a nonsuit, the learned Judge stating that "of course he could move against it." The question at the argument seemed to be whether at the trial the Judge had given leave to move, and on that account and in other respects the case seems to be in point.

In delivering judgment it fell from ROBINSON, C. J., who tried the cause, that both parties at the trial seemed unwilling to press the matter on, and he had given reason to suppose that the jury would be instructed that the libel had not been proved, and from what passed he had no doubt plaintiff's counsel considered if that view was incorrect he would be relieved from the nonsuit. MACAULAY, J., who dissented from the Court on this point, commenting on the report of the Chief Justice, that plaintiff could of course move against the nonsuit, said that no leave was expressly asked or given, and JONES, J.,

who thought plaintiff had a right to move, put it upon the ground that the Chief Justice at the trial, after plaintiff's evidence was in, ruled it insufficient, saying; "of course Mr. Cameron, (plaintiff's counsel,) can move against it."

In the case before us defendants' counsel moved for a nonsuit, and it seems to me from the report of the learned Judge, that this was a nonsuit with leave to move to test the sufficiency of plaintiff's case, and this seems to coincide with the intention expressed at the argument by the learned Judge who presided at the trial.

This question being disposed of it remains to determine whether there was evidence for the jury, and we think there was. As to the alteration; upon the rule of law requiring a party seeking to enforce a bill of exchange or promissory note to account for any alteration apparent on the face of the instrument, a verdict will be set aside where, without extrinsic evidence, a note or bill is submitted to the jury with an apparent alteration, for them to say whether such alteration was made before or after the instrument was negotiated. *Knight* v. *Clements*, 8 A. & E., 215. But that is not this case. In all such cases it must be clear that the instrument produced is in a different condition from that in which it originally existed. We were supplied by defendants' counsel with magnifying glasses for the purpose of detecting the alteration in this instrument, and wherever a doubt exists whether an alteration has taken place there is nothing to be presumed one way or the other, but it is for the jury to decide, and for this purpose they may inspect the writing. *Johnson* v. *Duke of Marlborough*, 2 Stark. R., 278; *Bishop* v. *Chambre*, 3 C. & P., 55; *Taylor* v. *Morley*, 6 C. & P., 273; *Caries* v. *Tattersall*, 2 M. & G., 890.

The extrinsic evidence as to the time at which, and the circumstances under which the alteration was made is also for the jury, and in this case, as no preliminary objection was raised as to the admissibility of the instrument, it cannot be contended, we think, that the jury were not to pass upon the disputed date.

The evidence, we think, of the cancellation of the stamps was also for the jury.

JOHNSTON *v.* POYNTZ ET AL.

A RULE for appeal from the County Court was taken in the following form; on motion, it is ordered that an appeal from the judgment in this cause be allowed to the Supreme Court, and that said judgment be set aside and new trial granted or judgment be entered for defendant on the grounds following, that is to say, &c., &c.,—and that in the mean time all further proceedings on said judgment be stayed, unless cause to the contrary be shown before the Supreme Court at the next December Term, and that meantime all proceedings be stayed. This rule was signed by the Clerk, but on the rule was endorsed a fiat, signed by the Judge of the County Court, commanding the Clerk, on bond being filed, to sign the rule as of the last day of the sittings, when it was moved for. The Court refused to dismiss the appeal on the ground of informality.

See *Woodill* v. *LeCras*, ante, p 7.

IN this cause an appeal was taken from the decision of the learned Judge of the County Court sitting at Windsor, the rule for appeal being in the following form:

IN THE COUNTY COURT, 42 VIC., 1878.

HANTS, SS.

James Johnson, Plaintiff,

vs.

James Poyntz and John Otis King, Defendants.

On motion, it is ordered that an appeal from the judgment given in this cause on the last day of the present sittings at Windsor be allowed to the Supreme Court, and that the said judgment be set aside and a new trial granted, or judgment be entered for the defendants with costs, on the grounds following; that is to say, on the several grounds taken for nonsuit on the trial of this cause, for the improper rejection and reception of testimony thereat, that the said judgment is against law and evidence, the damages excessive, and that by section 6, chapter 8, 41st Victoria, 1878, acts of the Province, the proceedings in respect to which this action is brought were and are declared and rendered valid and binding previous to the judgment herein being rendered, and that in the meantime all further proceedings on said judgment be stayed, unless cause to the contrary be shewn before the said Supreme Court at the next ensuing December term thereof at Halifax, and that in the meantime all further proceedings in said judgment be stayed.

Dated this second day of December, 1878.

By the Court,

(Sgd.) ISAAC CARVER, *Clerk.*

On the back of the rule was the following indorsement:

Let the clerk of the Court sign this rule as of last day of last November sittings when the same was moved for, upon defendants filing the bond required by 26th section of chapter 6, Acts of 1877, on or before the 14th instant.

(Sgd.) G. A. BLANCHARD.

December 12th, 1878.

Meagher moved on the 22nd March, 1879, before SIR WILLIAM YOUNG, C. J., DESBARRES, JAMES and WEATHERBE, JJ., to make absolute a rule *nisi* to quash the appeal on the ground of informality, and referred to the case of *Woodill* v. *LeCras*, ante, p. 7.

Johnston, Q. C., contra.—The rule here is an absolute rule for an appeal. and the *nisi* clause only applies to the judgment of the Court below. It may be regarded as surplusage. The action is against two commissioners for discharging a debtor arrested under process issued out of the County Court. Judgment was given against them after the Act of 1878, chapter 8, came into force, the Judge of the County Court, G. A. BLANCHARD, ESQ., holding that the Act was not retrospective.

Another ground of the rule to dismiss the appeal is that the rule is signed by the clerk and not by the Judge, but the draft rule has a memo. or fiat signed by the Judge in his own hand, directing the clerk to sign the rule as as of the last day of term, when it was moved, on security being filed.

The *nisi* clause in my rule does not apply to the clause granting an appeal, but to the stay of proceedings clause. Even if held to come within the case of *Woodill* v. *LeCras* that decision should not be held irrevocable.

Meagher, in reply.—The only difference between the two rules is that this says, "it is ordered that an appeal, &c., be allowed to the Supreme Court, and that judgment be set aside, &c., unless cause to the contrary be shown," while the rule in *Woodill* v. *LeCras* read, "I do order that the judgment be set aside and an appeal granted, unless cause to the contrary be shown." This Court cannot mould this rule.

The COURT discharged the rule *nisi* to dismiss the appeal.

EWART ET AL. v. MERCHANTS' MARINE INSURANCE COMPANY.

THE application for marine insurance described plaintiff's vessel as "A 1," the fact being that she was classed "A 1" American Lloyds. Defendants pleaded in effect that the vessel was unseaworthy, and that she "had been misrepresented to be a sea-going ship classed 'A 1' in Lloyds, or some similar institution for the classing of shipping, whereas said vessel was not a sea-going ship, but was a centre-board canal-boat, built to navigate inland waters only, and was not classed 'A 1' in Lloyds or any other similar institution, but was of inferior quality and of no class whatever." Evidence was given that she was "perfectly tight two days only after leaving port," and also to shew that the classification of "A 1" American Lloyds did not give an ocean-going vessel the same character as the corresponding class in English Lloyds. The weight of evidence on this point appeared to be with the plaintiffs, and, as to unseaworthiness, the presumption arising from the condition of the vessel shortly after leaving port, as above described, was rebutted by clear evidence that she was "in good condition and seaworthy when she sailed." The Court upheld the verdict for the plaintiff.

THIS was an action on a policy of marine insurance to recover the amount insured on the centre-board schooner "Pacific," built on the Ontario Lakes, and abandoned on a voyage from Charleston, S. C. to a port in the United Kingdom. The main defence relied on was misrepresentation as to the classification of the vessel, which was described in the application for insurance as "A. 1," the defendants claiming that this description was understood by them as a representation that the vessel was so classed in "English Lloyds," when in fact she was classed in the "American Lloyds Universal Standard Record;" also that the vessel was not seaworthy when she started on the voyage for which she was insured. The cause was tried at Halifax, in November, 1878, before Mr. Justice DESBARRES, without a jury. Judgment was given for plaintiffs for the amount of the policy, and a rule *nisi* granted to set the same aside. The rule *nisi* was argued February 21st, 1879, before DESBARRES, MCDONALD, SMITH and JAMES, J J.

Ritchie, Q. C., in support of rule.—Any material misrepresentation, whether made in bad faith or not, will avoid the policy. *1 Parsons*, 404, 407, 468; *1 Arnould*, 475, 481. When the representation has a direct bearing on the risk, it must be considered material, unless the assured shews that the minds of the underwriters were not influenced by the representation. *1 Arnould*, 493–4. The vessel was represented to the insurers as "A. 1," the word "classed" not being used, and it is in evidence that they understood that to refer to the classification

of English Lloyds, and that they would not have taken the risk otherwise. Scott Mitchell, who sent the telegram applying for the insurance, in which the vessel was represented as "A. 1," says he would not have used the "A. 1" if he had known the vessel to be a centre-board vessel, classed in the "American Lloyds Universal Standard Record." The concealment of the fact of the vessel being a centre-board vessel was an improper concealment. The evidence raises a presumption that the vessel was unseaworthy when she started on her last voyage.

Rigby, Q. C., contra.—The burden of proof as to improper concealment and misrepresentation lies upon the defendants. *13 M. & W.*, 655; see particularly pp. 662 and 663. The concealment of the fact of the vessel being a centre-board vessel may be considered proved, but not the misrepresentation as to the classification. The opinion of the underwriters as to the materiality of a representation is inadmissible. *2 N. & M.*, 542. It is for the jury, not the Court. *8 B. & C.*, 586; *11 M. & W.*, 126. The proper evidence to guide the judgment of the jury is that of persons conversant with the matter; *Starkie N. P. C.*, 258; *10 B. & C.*, 540. The question of custom and customary meaning is discussed in *1 Oldright, N. S. R.*, 259. It is arguable that the words "A. 1" on the face of the application, refer to the owners, and not to the vessel at all. The witness called to prove that the vessel would not be classed "A. 1" in English Lloyds admitted that he had, in Quebec, classified nine centre-board vessels, all he ever inspected, as "A. 1" in English Lloyds. We have evidence that the requirements of the American Lloyds for Provincial vessels are more severe than those of English Lloyds, and that the certificate in evidence had been used for insuring the same vessel several times previously. The evidence of the defendants' witnesses that they would not have insured the vessel if they had known her to be a centre-board vessel, is ridiculous, as they all admit they never saw a centre-board vessel. As to the burden of proof, see *Taylor on Evidence*, 323. The defendants have not proved that this vessel was not classed "A. 1" in English Lloyds. The Judge, sitting as a jury, has found the immateriality of the representations here, and his finding is more conclusive than the finding of a jury, as there is no imputation of prejudice.

Ritchie, Q. C., in reply.—The onus is upon plaintiffs to shew that the minds of the insurers were not influenced by the misrepresentations. The whole question of the admission of the evidence of the underwriters is discussed in *Arnould*, 588. We had the best witness available as to the class of this vessel, Mr. Ray, the Surveyor of English Lloyds. He admits having classified centre-board vessels, but says they were only so classed for lake navigation, and that the English Lloyds' certificates distinguish as to the trade for which they are given. Plaintiffs bring shipcarpenters to prove centre-board vessels to be seaworthy, but none of them ever sailed in one. We have proved by Mr. Ray that the vessel was not an "A. 1" vessel, and there is no evidence that she had been classed "A. 1" anywhere. The paper in evidence is not properly proved to be a certificate of classification. The agent of the assured states what he meant by the terms "A. 1," and he binds his principal. The terms bore the meaning which the parties to the contract understood them to bear.

SMITH, J., now, (March 10th, 1879,) delivered the judgment of the Court:—

This is an action brought to recover the sum of $6000 on a policy of insurance issued by the defendants on the hull of the schooner "Pacific," on a voyage from Charleston, S. C. to a port in the United Kingdom. It was tried before Mr. Justice DESBARRES, without a jury, during the last sittings of the Supreme Court, at Halifax, and a judgment was given for the plaintiffs for the amount claimed. A rule *nisi* was granted to set aside said judgment on the ground that the same was against law and evidence, and for the improper reception of evidence, and was argued during the present Term.

The defendants pleaded several pleas, the first four of which it will be unnecessary to refer to. Those which raise the questions for our consideration, and which were relied upon mainly, if not entirely, at the argument, are the fifth, sixth, seventh, eighth, ninth and the added plea. They set up three defences, viz.;—1st. That the vessel was unseaworthy at the commencement of the voyage. 2nd. The misrepresentation of material facts. 3rd. The concealment of material facts. The facts alleged to have been concealed and misrepresented are

variously set out in the different pleas, and are somewhat distinct. The sixth avers that the vessel was misrepresented as being "classed A. 1, but in fact was not so classed, and was an inferior vessel, without any class whatever." The seventh clause states that she was misrepresented to be "a sea-going ship classed A. 1 in Lloyds, or some similar institution for the classing of shipping, whereas the said vessel was not a sea-going ship, but was a centre-board canal boat, built to navigate inland waters only, and was not classed A. 1 in Lloyds or any other similar institution, but was of inferior quality, and of no class whatever." The eighth and ninth pleas allege the *concealment* of substantially the same facts; while the last and added plea sets out a misrepresentation that "the vessel was A. 1, when in fact she was not but an inferior vessel."

We have now to consider to what extent the defendant has sustained his pleas by the evidence furnished at the trial, and whether the testimony was of such a character as to prevent the learned Judge, while exercising the functions of a jury from finding for the plaintiff. In other words, did the weight of evidence so strongly preponderate in favor of the defendants as to require the Judge to give a judgment for them. I must confess it occurred to me at the argument not only that the testimony was not of this description, but that it justified the conclusion arrived at. It was urged by Mr. Ritchie that the fact of the vessel being "perfectly tight for two days only" after leaving her port of departure, as testified by James Ewart, the mate, was strong evidence that she was not seaworthy at the commencement of the voyage. I can find no authority which goes the length of this contention. Arnould lays it down, (vol. 1, p. 610,) that "if in a short period after sailing on the voyage the vessel becomes leaky and founders, or is obliged to put back, or run for a port of distress without encountering any extraordinary peril, or other visible cause to produce such effect, there arises a presumption of fact that she was not seaworthy when she sailed." And he adds, "if in such cases it be found on survey that the leakiness arose from loosening of her timbers owing to the decayed state of her bolts and fastenings, that is, generally speaking, a clear case of unseaworthiness." In the absence of such a survey and proof here, on the authority of this writer, only *a presumption*

is created against the seaworthiness of the vessel, which presumption, like all others, can be rebutted. In *Wilson* v. *Jones*, L. R., 2 Exch., 143, the jury found against the presumption, but in this case the evidence of John and James Ewart is in direct hostility to it. The former says; "The vessel was not less seaworthy in consequence of being a centre-board vessel, for an ocean voyage. I was in Charleston when she loaded on her last voyage, and accompanied her out to sea, and returned in a tug. She was in good condition and seaworthy when she sailed." James Ewart says; "She was in every respect well found and thoroughly seaworthy when she left Charleston. She was caulked at Charleston, before leaving, from the keel to the covering-board, the bottom painted, and in every other respect well found." In the face of such direct testimony as this, it appears to me that to hold that a mere presumption should prevail, would be entirely repugnant to legal principles, and it would be far more strange that we should say that the learned Judge, exercising his functions as a jury, had wrongly concluded on this issue.

Having disposed of this part of the defence, let us now consider the two other questions raised by defendants pleas, *i. e.*, misrepresentation and concealment of material facts from the defendants. The sixth plea confines the misrepresentation to the *classification* of the vessel, and alleges that she was stated to have been classed A. 1, and had no class whatever. I consider this plea, not only most unsatisfactorily attempted to be sustained, but answered by a preponderating weight of testimony on the part of the plaintiffs. It cannot be for a moment contended that the vessel was not classed A. 1, or that she was without class. The certificate of Alexander McLean, the Inspector of American Lloyds, taken in connection with the evidence of John Ewart, I am of opinion, satisfactorily establishes this. It was urged on behalf of the defendants that a vessel classed A. 1 had reference entirely to a classification in English Lloyds, and that, in that acceptation, the representation in the telegram upon which the application was based and the policy issued, was a misrepresentation of a fact material to be known to the defendants; but it must be remembered that the plea I am considering simply denies a classification generally. The seventh and eighth pleas can, as I apprehend it, only be

sustained upon the supposition that class A. 1, given by the American Lloyds, is inferior to that of English Lloyds, and does not carry with it the same significance and guarantee of the character of the vessel thus classed. The seventh plea states that the vessel was not classed A. 1 in Lloyds, or *any similar association*, and the eighth avers she was not classed in Lloyds "*or any association* for that classing of shipping." I can only understand the words "any similar association" as referring to the standard of class which Lloyds' certificates confer, in comparison with others, and so only can I construe the words used "or any association for that classing of shipping." If the difference contended for really exists, and if A. 1 American Lloyds does not give that character to an ocean-going vessel which the English Lloyds does, and would be only given to a centre-board vessel for the purpose of navigation on the lakes, then I might reasonably suppose that the learned Judge would hesitate in deciding against the defendants on these issues. But does it so abundantly appear as to leave him no alternative? I think it does not, but on the contrary it seems to me, on a careful examination of the evidence, that the weight of it is the other way. James Fraser, who held an English certificate since 1867, and was master since 1863, and who states he has been round the world, testifies that he "would rather take a risk on a ship in American Lloyds than on a ship classed A. 1 in England. I can't say that ships classed A. 1 at English Lloyds are the best ships afloat, as a class, because no ships built of Nova Scotia wood can get classed at American Lloyds at more than one-half A. 1, whereas the same ships would be classed at English Lloyds A. 1 for a time."

The defendants have produced several witnesses whose *opinions* were relied upon as explaining the words A. 1 and also as to the character of a centre-board vessel. Before referring to this evidence, I may remark upon the peculiarity existing in the law both in England and the United States upon the admissibility of this description of testimony. It is singular to find that while recognizing the province of a jury wholly to pass upon the materiality of a representation, the decisions are in conflict on the point whether the jury, in forming their judgment, can be assisted by the evidence of skilled witnesses, such as brokers and underwriters. There are numerous cases

both ways. It seems, as far as I can gather from the authorities, to be still a *vexata questio*, but in the opinion of Mr. Arnould the arguments in favor of the reception of such testimony greatly outweigh those against it. However, we must deal with the testimony as presented by the Judge's minutes. Mr. Mitchell, who caused the insurance to be effected at the instance f C. F. Fortier, Manager of the Marine Branch of the Royal Insurance Company at Montreal, gives his impression, or what he understands of the letter and number A. 1, and undertakes to say that had he "known the 'Pacific' was a centre-board vessel, and built on the lakes" he would not have represented her to be A. 1. He also says; "I would not, as an Insurance Agent, with my personal knowledge, have taken the risk." I have no doubt the witness was expressing a conscientious opinion, but the weight of its reasonableness was most probably gauged by the Judge in the light of the witness's statement on cross-examination where he says; "Can't mention any place where I have seen any centre-board vessel, and only know the character of such a vessel from what I have been told. Don't know the difference between a centre-board vessel built on the lakes and one built at any other place." The testimony of Walter G. Ray, a Surveyor for the *Bureau Veritas*, would naturally have some weight upon a question so peculiarly within the range of his business, but it is simply an expression of *his opinion* that the A. 1 meant a first-class vessel. He did not think the vessel fit for the voyage on which she was lost, and gives as his *only* reason that she was too shallow for her length, and was a centre-board vessel. Wright, the Secretary of defendant Company, states that he understands when a vessel is classed A. 1, she is classed A. 1 at Lloyds, or some *similar institution*. Belcher, the President of the defendant Company, says; "A. 1 on the application is understood by the Board to mean A. 1 at Lloyds. By Lloyds I mean English Lloyds. We would not have accepted the risk if we had known the 'Pacific was a centre-board built vessel." Mr. Twining gives also his opinion as to the inferior standing of the American Lloyds, and as to the character of centre-board built vessels, adversely to both; but, contrasting the defendant's testimony with that of the plaintiffs, it is impossible to say that the learned Judge had not evidence before him which

called upon him to decide upon the propriety and correctness of the views expressed by the respective witnesses. Keen says; "I am of opinion that they, (viz., centre-board vessels,) are as strong as other vessels." Stewart testifies that "they are stronger built amidships than vessels without a centre-board. I would not, if I were an insurer, consider a centre-board vessel a greater risk than vessels of the ordinary construction, nor would I ask a higher premium. The fact of a vessel being long and narrow does not affect her seaworthiness, if well found." And he also adds; "A centre-board vessel classed A. 1 would be as seaworthy as any other vessel for an ocean voyage. As an insurance broker I would prefer a centre-board vessel classed as American Lloyds' A. 1 to a vessel classed A. 1 at English Lloyds as an insurance risk of the same description." John Ewart says he superintended the building of the vessel, and describes her as strongly constructed, and that he had commanded her on several ocean voyages, and found her "a good seaworthy vessel, the best I ever had my foot on board of in bad weather." During these voyages, it is a significant fact to discover from this witness, that "she was insured in the English Lloyds," and that he shewed McLean's certificate whenever he chartered or insured the ship, which was always recognized.

The added plea, likewise, which denies that the vessel was A. 1, and alleges that she was an inferior one, can be sustained only by relying entirely upon the evidence adduced for the defendants. I think I could have arrived at no other conclusion, from a careful consideration of the evidence, than that to which the learned Judge has come. If a jury had so found it would hardly be urged that the Court, under such testimony, would have disturbed the verdict. I do not think we can do so now, and therefore the rule must be discharged with costs.

COUNTIES RAILWAY—EX PARTE HARDY.

ppointed under an Act to re-appraise lands taken for railway purposes was provided that the re-appraisement "together with the costs ld be a County charge.
or services before the Commissioners for re-appraisement could not ded only for those incurred prior to its passing.

came before the full Court upon a rule *nisi* to aside a taxation of costs under the following

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of the Western Counties Railway crossed the Hardy in the County of Digby. A jury, under ns contained in the act concerning Railroads, . S., 3rd series, sec. 49,) entered upon Hardy's land n assessment of the damages sustained by him. assessment Hardy, together with about thirty other land, appealed. After a rule of court had passed f these cases, sending them for trial before a jury at us, the Legislature passed an act providing for a sement of all the lands crossed by the line of said throughout the whole county, by a commission of o be chosen by the claimants, the contractors, and the , (1879, c. 35.) The commissioners were invested with to reappraise said lands, which reappraisement, "together costs heretofore incurred," were to be a county charge. fter the passing of this act the attorney of Hardy taxed osts incurred up to that time, as also his costs in the suits everal other owners whom he represented.
The commissioners made a reappraisement of all the lands, d were attended in their deliberations by the attorney, who ught to tax a second bill in each case for the services thus endered.

Upon motion to review the taxation thus made it was argued by *Rigby*, Q. C., of counsel with Hardy and the other claimants, that the attorney was entitled to some costs at least, if only to those incurred in moving the Court to confirm the award on reappraisement of the commissioners.

...mington, of counsel with the County of Digby argued ... any costs was merely statutory; that

the act providing for the reappraisement not only made no provision for taxing any costs for services before the commissioners, but, by providing for the assessment of all costs "heretofore incurred," by implication excluded such contention; that the costs of moving to confirm the award could not be taxed by any individual proprietor, because such confirmation should be procured by one general motion to confirm the whole award.

SIR WILLIAM YOUNG, C. J., now, (March 10th, 1879,) delivered the judgment of the Court:—

We all think this taxation must be set aside. The act makes no provision for taxing costs for services before the commissioners. It provides for an assessment upon the county of those costs incurred prior to its passing, which costs have been taxed in all these cases, and this provision is inconsistent with the idea of taxing for these services.

The award might be confirmed upon one motion for all, and each individual owner is not entitled to tax costs upon a separate motion.

FISHER *v.* ANDERSON ET AL.

TESTATOR, by his last will directed that until the expiration of four years from his decease, his executors should every year place to the credit of each of his children $1600, and if any of his children should have died, leaving issue, then a like sum "to and among" the issue of the child so dying. He then provided substantially as follows:—as regards the division, appropriation and ultimate disposition of my estate, it is my will that, subject to legacies, expenses, &c., all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof "be distributed, settled, paid and disposed of to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead," in manner following, that is, that on the expiration of four years from my death, the executors, after providing for legacies, expenses, &c., "shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue them then surviving shall amount to, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children whose lawful issue shal be then surviving, all the issue of each deceased child stan ding in the place of such deceased child." And a separate account shall be kept of each share apportioned to such child or children, or wherein such issue shall be interested, "it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of twenty-one years, shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before then died, leaving issue, shall be drawn from the share or shares set apart for the issue of such

deceased child or children; and that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled."

And as respects the shares of my daughters, I direct that the share of each daughter be invested, and the interest paid to her so long as she shall live, "and that on the death of my daughters, the share, claim or interest of such of them as shall have been married and shall leave children her surviving, shall be apportioned and distributed as follows, namely; ten thousand dollars, part of the share of such daughter in such manner as she shall by any instrument in writing in her hand, subscribed in the presence of one or more witnesses, direct and appoint, and the balance of such share shall be paid, apportioned and distributed to and among the children and grand-children in such proportions as she shall by any instrument in writing under her hand, subscribed in the presence of one or more witnesses, direct and appoint; and in default of any such appointment to and among her children and grand-children in equal shares, the said grand-children standing in the place and being entitled to the share or shares of their deceased parents or parent respectively."

One of the daughters having died within two years after the death of the testator without making any will or exercising her power of appointment, and having left three sons under age, her surviving, one of whom died under age seven years after testator's death,

Held, (WEATHERBE, J., dissenting,) that the sons took as joint tenants and not as tenants in common, and that the interest of the deceased son of testator's daughter went to his surviving brothers.

THE following case was agreed to and argued before His Lordship the Judge in Equity:—

IN THE SUPREME COURT IN EQUITY, 1878.

HALIFAX, SS.

On or about the 24th day of December, A. D. 1870, the Honorable John H. Anderson departed this life, having first made his last will and testament, a true extract wherefrom is hereto annexed, marked "A."* At the time of his death he left several children him surviving, and amongst others Mary Louisa, then the wife of Charles H. B. Fisher, one of the parties hereto. The said Charles H. B. Fisher was married to the said Mary Louisa Anderson on the 26th day of May, A. D. 1864, and at the time of the death of the said John H. Anderson there were living of the issue of the said marriage the following persons, namely; Henry Anderson, born on the 31st day of August, A. D. 1866; Edwin Bayard, born on the 7th day of September, 1867; Walter Stanley, born on the 11th of September, A. D. 1869. The said Mary Louisa departed this life on the 25th day of August, A. D. 1872, leaving the said children her surviving. The said Mary Louisa died without having made a will and without having exercised any right or power of appointment conferred upon her by the said will.

* See *post* p. 179.

On the 14th day of September, A. D. 1877, the said Henry Anderson Fisher departed this life, leaving his two brothers him surviving and who are still living.

The said extract hereto annexed marked "A" is the only portion of the will of the said John H. Anderson which in any way bears upon the question intended to be raised by this case, but either party shall be at liberty to produce and use at the argument hereof a copy of the entire will of the said John H. Anderson, providing the same is certified under the hand of the Registrar of the Court of Probate for the County of Halifax. and sealed with the seal of the said Probate Court.

George R. Anderson, John Starr, and Andrew K. Mackinlay are now the executors and trustees of said will.

The said Charles H. B. Fisher, as the father of the said Henry Anderson Fisher, claims that upon the death of said Henry Anderson Fisher his share in the estate of the said John H. Anderson became the property of him the said Charles H. B. Fisher, and did not go to the surviving brothers of said deceased child.

The foregoing statement of facts has been agreed upon by the said Charles H. B. Fisher on his own behalf, and by the said George R. Anderson, John Starr and Andrew K. Mackinlay, as such executors and trustees as aforesaid, on behalf of their *cestuis que trustent* who are interested in said fund, and the opinion of this Court is sought as to whether or not the share of said Henry Anderson Fisher upon his death vested in his father, the said Charles H. B. Fisher, as his heir or legal representative.

Nothing herein contained shall be construed to deprive the party against whom the judgment of this Court shall be given of the right of appeal from such decision.

Dated Halifax, February 4th, 1878.

The following is the extract from the will referred to in the case as annexed thereto marked "A" —

As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payment of my just debts and legacies, bequests and annuities I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue

and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following that is to say:

That immediately on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue then surviving shall amount to, and shall apportion and set off one such share to each of my then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child.

And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and of the payments made to or on account or for the maintenance and education of each of my said children or issue, which shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue,—it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of twenty-one years, shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before then died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children.

And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years,

when respectively they shall have attained the age of twenty-one years. shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled.

And as respects the shares and interests of my daughters in and out of my estate, it is my will, and I hereby direct that the share, proportion and interest of each of my daughters in and out of my estate shall be and remain invested in trust during her natural life, that she may receive the interest, increase and profits in manner as hereinbefore mentioned, so long as she shall live, and that on the death of my daughters, the share, claim or interest of such of them as shall have been married and shall leave children her surviving, shall be apportioned and distributed, as follows; ten thousand dollars, part of the share of such daughter in such manner as she shall by any instrument in writing in her hand, subscribed in the presence of one or more witnesses, direct and appoint, and the balance of such share shall be paid, apportioned and distributed to and among the children and grand-children in such proportions as she shall by any instrument in writing under her hand subscribed in the presence of one or more witnesses, direct and appoint; and in default of any such appointment to and among her children and grand-children in equal shares, the said grand-children standing in the place and being entitled to the share or shares of their deceased parents or parent respectively.

The following decision was delivered by RITCHIE, E. J.:—

The testator having made an annual provision for his children, and contemplating the possibility of the death of any of them, for the issue of such of them as might have died till the expiration of four years from the time of his decease, postponed the division, appropriation, and ultimate disposition of his estate till then, when distribution was to be made among those of his children who should then be alive and the issue of such of them as might be then dead.

Mary Louisa, testator's daughter, the wife of Charles L. B. Fisher having died within the four years, the share which she would have taken if she had been then living,

her three children, and one of them having since Fisher, the father, now claims to be entitled to one-he share, being the interest which his deceased child t.

testator has clearly expressed his intention that, in the death of any of his children before the period of ribution, no interest in the residue of his estate should ted in them, but in that case the issue, that is. the chil-of such deceased child, should take, not through the t, but directly, as legatees or purchasers under his will, t appears to me the only question is whether the children r. Fisher took as tenants in common or as joint tenants; ney took as tenants in common, the father would be tled to his deceased child's interest, if as joint tenants, his thers are entitled as survivors.

A bequest to two or more persons simply makes the gatees joint tenants; the rule is, not that express words are quired to create such estate, but that, to create a tenancy in ommon, there must be words introduced showing a severalty of nterest. See *Roper on Legacies*, 1360. The law on the sub-ject has been long settled, and there are numerous cases to hat effect extending far back. I will merely refer to one of a late date closely resembling that under consideration, *Bridge v. Yates*, 12 Sim., 645. The testator there gave one-fourth of his residuary estate in trust for his wife, and, after her decease, in trust for and to be equally divided among all his children who should then be living and the issue of such of them as should be then dead, such issue to take only the part its deceased parent could have taken if living. Two children and two grand-children, the issue of a deceased child of the testator, were living at the death of the widow. The two grand-children, as between themselves, were held to be joint tenants and not tenants in common. V. C. SHADWELL; "The testator speaks of no division among the children themselves, and therefore, my opinion is that they take the parent's share as joint tenants." The earlier cases are referred to in *Campbell* v. *Campbell*, 4 Bro. Ch. C., 15, and among the late cases are *Heaseman* v. *Pearse*, L. R., 11 Eq., 522; *Leak* v. *MacDowal*, 32 Beavan, 28; *Lanphier* v. *Buck*, 2 Dr. & Sm., 484, and *In re Hodgson's Trust*, 1 K. & J., 178.

Mr. Anderson directed that immediately after the expiration of four years from his death, after his debts, legacies, and the expenses of his estate were provided for, his estate should be divided into as many just and equal shares as the number of his then surviving children, and of his children who should before then have died leaving lawful issue them then surviving should amount to, and that one such share should be apportioned and set off to each of his then surviving children, and one such share to the lawful issue of each of his then deceased children whose lawful issue should be then surviving, all the issue of such deceased child standing in the place of such deceased child; and he directed that a separate account should be kept of the interest and profits of each share, and of the payments made to and on account of the maintenance of each of his children and of the issue of a deceased child; so that while each of his children take a separate share, the children of Mr. Fisher take a joint interest in the share set apart for them. There is no reference to a division among them throughout the will and I can find no words to sever their interests or to indicate an intention on the part of the testator that they should take in severalty. On the contrary, any expressions leading to such an inference seem to have been carefully avoided, and from the whole tenor of the will I am induced to think it was the testator's intention that the interest of the issue of a deceased child should be joint, that until a severance of that interest by themselves, which could only take place after they came of age, in case of the death of any of them, his share should go to the survivors.

It sometimes happens that the right of survivorship in the case of joint tenants works an injustice, which leads courts rather to favor a tenancy in common, but no hardship or injustice arises in this instance. Those will enjoy the share who were the especial objects of the testator's bounty, while the effect of holding that the children of Mr. Fisher were tenants in common of the share would be, in my opinion, to defeat the very manifest intention of the testator. It is safer, however, to act upon the fixed rule of construction, that where there are no words to sever the interest, legatees must take as joint tenants, than to proceed upon any supposed intention of the testator.

The rule I have referred to as governing this case applies only to personal property, as in the case of real estate our Legislature has declared that an estate granted or devised to two or more shall be a tenancy in common, unless expressly declared to be joint tenancy.

The decree will be for the defendant, with costs.

An appeal was taken from this decision to the Court *in banco* and argued this term before RITCHIE, E. J., DESBARRES, SMITH and WEATHERBE, JJ.

Rigby, Q. C., for appellant.—We do not contest the ground taken by His Lordship in this respect, namely that a bequest to two persons without more makes a joint tenancy, but our contention is that there are words in this will showing an intention to create a tenancy in common among testator's grand-children, particularly children of his daughters. *12 Sim.*, 645; *1 K & J.*, 178; *Theobald on Wills*, 204, are authorities showing that the courts favor tenancies in common, and attribute the power of making interests tenancies in common to a number of words, such as "respecting," "equally," &c.

We admit that without words making the tenancy a tenancy in common it is a joint tenancy; but we claim that there are sufficient words in the will to effect that purpose. The will uses these words, "the share of each of them shall be *apportioned and distributed* as follows," and again, "shall be paid, *apportioned and distributed* among the children and grand-children," speaking of the share of his daughter Mrs. Fisher. The words "apportioned and distributed" are significant, and, further, the provision for the grand-children of Mrs. Fisher contemplates necessarily a severance of the interests of the children, not a joint tenancy.

There is also a provision in the will requiring the trustees to keep separate accounts of the profits of the several shares, and that as each child or grand-child attains the age of twenty-one years, each shall be "severally" entitled to receive his share. If all these children had died under the age of twenty-one years, but after the division, the father certainly would be entitled to receive their shares. It is impossible that the children should have a joint tenancy till one attained the age of twenty-one, and that then the nature of the estate should

change without the act of the parties. The interest vested at the time of distribution, four years after testator's death; the provision as to the children and grand-children coming of age is only to fix the time of paying over the respective shares.

Cites *Theobald on Wills*, 155; *4 Sim.*, 129; *Fish. Dig.*, 1871, p. 386; *Fisher*, 9062, citing *Grant* v. *Lawrence*, from Wightw.; *Cowper*, 352; *3 Melville*, 335; *Jarman on Wills*, (Eng. ed.,'61,)798; *L. R., 13 Eq.*, 128; *1 R. & C., Eq. Reps.*, 46.

Ritchie, Q. C., contra.—Our contention, of course, is that the testator's grand-children here took jointly. Their accounts were directed to be kept jointly, the joint shares accumulated in a certain manner, and the cost of their joint maintenance is taken out.

With respect to the clause providing for the children and grand-children coming of age and taking the interest and profits of their shares, I contend that all the grand-children must be twenty-one. I apply the word, "severally," to the children individually and the grand-children as families. There is no clause in the will, in fact, providing for the payment of the principal to the grand-children.

The word "shares" means, throughout the several clauses of the will, the shares provided for in the clause of division, as many shares as there were children living and children who had died having lawful issue at the time of division.

Cites *2 Jarman*, 233, 238; *L. R., 13 Eq.*, 28; *11 Id.*, 539; *L. R., 6 Ch. D.*, 696; *9 Ves.*, 204.

Rigby, Q. C., in reply.—Cites *L. R., 4 Eq.*, 140; *5 Id.*, 51, 346; *33 Beavan*, 348.

DESBARRES, J., now, (April 23rd, 1879,) delivered the judgment of the Court:—

This case comes before us by appeal from the judgment of the Equity Judge, with a statement of facts agreed upon by the counsel of the contending parties, by whom the opinion of this Court is sought as to the construction of the will of the late Hon. John H. Anderson, in respect to the disposition of his property among his children and grand-children. After making a temporary provision in his will for his children and the issue of such children as might die within the period of four years after his decease, the testator directed that the

ultimate disposition of his estate should be made in the following manner, that is to say: "That immediately on the expiration of four years after my death my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense and management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children, and of my children who shall before then have died having lawful issue them then surviving, shall amount to, and shall apportion and set off one such share to each of my then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall then be surviving; all the issue of such deceased child standing in the place of such deceased child. He then directed that from thenceforth, (that is from the division of his estate), a separate account should be kept by his trustees of each share and of the interest and profit thereof, and the payment made to or on account, or for the maintenance and education of each of his said children or issue should be charged against the shares apportioned to such child or children, or wherein such issue should be interested so that all accumulations and profits that might arise should enure to the increase of each several share, on which such accumulations or profits should accrue; it being, (as he declared), his intention that after such division should take place, the maintenance, education and support of each of his children while under the age of twenty-one years should be drawn from the separate income of such child, and the maintenance and education of the children of any of his children who had before then died leaving issue, should be drawn from the share or shares set apart for the issue of such deceased child; and, that his children and such issue of deceased children, being of the age of twenty-one years, should be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of his estate to which they might be respectively entitled.

The will of the said John H. Anderson is dated 10th July, 1869, and it appears from the statement furnished by counsel that he died on the 24th December, 1870, leaving several

children him surviving, and, among others, Mary Louisa, then the wife of Charles H. B. Fisher, to whom she was married on the 26th May, 1864. She died on the 25th August, 1872, leaving three children, Henry Anderson Fisher, Edwin Bayard Fisher, and Walter Stanley Fisher, her surviving. Henry Anderson Fisher, the eldest child, was born 31st August 1866, and died 14th September, 1877, his two brothers him surviving; and the question is whether the two brothers, who are still living, are entitled to take the deceased brother's share, being the third part of his mother's share in the estate of her father, or whether that share passed to the father, Charles H. B. Fisher, under the testator's will;—in other words, whether the three brothers, four years after the death of their grand-father, took their mother's share of his estate as joint tenants or tenants in common. It was contended by Mr. Rigby, the counsel of Mr. Fisher, that the three children, the issue of Mary Louisa Fisher, took her share in her father's estate as tenants in common under his will, and, if this contention is well founded, Mr. Fisher's claim to the share of the deceased son must unquestionably prevail. But, looking at the language of the will under which that claim is made, I have not been able to discover anything in it indicating an intention on the part of the testator that the grand-children should take their parent's share of his estate as tenants in common. The cases cited at the argument, which I have read, have produced a very different impression on my mind from that which they appear to have made on the mind of the learned counsel for the claimant. It is not necessary to review all the cases for and against the plaintiff's contention; I will only refer to some of them to show the grounds on which my opinion has been formed. The oldest of the cases cited is that of *Campbell* v. *Campbell*, 4 Brown's Ch. R., 15, decided in 1792, in which it was held that where in a will as to a residue two thirds were given to and amongst the children of A. and B. they took as tenants in common, but, the remaining third being given without words of severance to the children of C, they took as joint tenants. In *Woodgate* v. *Unwin*, 4 Simons, 129, a case relied upon as favoring the claim of Mr. Fisher, there was a bequest to A. for life, and, after her death, to her children when they arrived at

twenty-one years. A. had two children both of whom attained the age of twenty-one years. It was contended that in order to create a joint tenancy there must be unity in point of time and in point of interest. The Vice-Chancellor held they were tenants in common, saying, "it is contrary to the rule of law that persons who are to take at different times can take as joint tenants. The property," he said, "must vest at once. From the necessity of the case the children who attained twenty-one must take as tenants in common." Here the share of Mrs. Fisher, under her father's will, vested in her children at one and the same time, viz., at the expiration of four years from her father's death. It is true they were not to receive all the interests and profits accumulating on that share until they attained the age of 21 years, but the share itself vested in all the children at the time named. If the mother's share of the testator's estate was not to vest in her children until they became twenty-one years of age it has not vested yet, and, in that case, Mr. Fisher's claim in right of his deceased son must necessarily fail, for he had not reached twenty-one when he died, and would not now be of that age if living. The case of *Bridge* v. *Yates*, 12 Simons Ch. R., 645, cited by the learned Judge in Equity in his judgment, as well as at the argument, is scarcely distinguishable from that under consideration. There the testator gave one-fourth of his residuary estate to trustees in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should then be living and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children and two grand-children, the issue of a deceased child of testator, were living at the death of the widow. *Held* that the two grand-children took as between themselves as joint tenants and not tenants in common, the testator not having spoken of any division among them. In the case of *Hodgson's Trust*, 1 K. & J., 181, the testator, after desiring his trustee to divide a principal sum unto and equally between his nephew and four nieces, share and share alike, directed, in case any of them should die leaving issue of his, her or their bodies before their share of the trust fund should become payable under his will, that the

share or proportion of each of them, his nephew and nie
dying, of and in the said trust fund, should be paid to
her children respectively, the children to stand in the
and stead of their respective deceased parents, and
entitled to receive their respective parent's shares of his
fund accordingly. *Held* by the Vice-Chancellor to be
to such children as joint tenants, concluding that the te
had used the word "respectively" in its ordinary and
mate sense, and that the effect of it was to allot the s
families of children each to its respective parent
McGregor v. *McGregor*, 1 DeG., F. & J., 63, a testator by hi
gave a moiety of his residuary estate, real as well as per
upon trust to pay the income equally amongst all his chi
who should be living when his youngest child attained tw
one, for their respective lives, and, after the death of a
them, upon upon trust as to an equal portion of the n
proportionate to the number of his children then livin
the use of the issue of such child or children so dying,
lutely forever. *Held* "that the word 'issue' included
children of the testator's children to the exclusion of
more remote descendants, and, secondly, that pursuant
intention of the gift and by analogy to dispositions ope
under the Statute of Uses, or dispositions operating
wills as distinguished from conveyances operating at Co
Law, the children of a child who died after the youngest
of the testator attained twenty-one took as joint tenant
proportionate share of the deceased child, although
respective interests in the proportionate part vest
different times as they respectively came into *esse*."
case shows that the rule at common law, that to create a
tenancy there must be unity in point of time as well as
in point of interest, does not apply to wills, for here the
dren of a deceased child took as joint tenants, although
respective interests vested at different times. In *Le*
McDowall, 32 Beavan, 28, a testator gave the residue
real and personal estate to his nephews and nieces livi
his death, but if any should be then dead their offspring
to be considered to stand in the place of their parents a
take the same benefit. The Master of the Rolls held tha
nephews and nieces took as tenants in common and

offspring took as joint tenants. The case of *Heaseman* v. *Pearse*, L. R., 11 Eq., 522, is to the same effect. In *Ryves* v. *Ryves*, L. R., 11 Eq., 539, a testator directed his debts to be paid in the first instance by his executors and executrix and then gave all the residue of his real and personal estate to his brother and sister to hold the same to his said brother and sister, their heirs, &c. But in case his brother died in the life-time of his sister, without leaving issue, then he gave his share and interest in the property to his sister absolutely, and he appointed his brother and sister executor and executrix of his will. The brother died before the testator, leaving a son who was the testator's heir at law, and the testator's personal estate was not sufficient for the payment of his debts. *Held* by the Vice-Chancellor that the gift of the residue to the testator's brother and sister was a gift to them as tenants in common, and that the share of the sister and the share of the brother, which had lapsed to the heir at law, must bear the debts equally. He said; "If the gift had been simply to the brother and sister of the testator, followed by the words of limitation, there would have been no question but that they would have taken as joint tenants, but the testator continues, 'in case my said brother should die in the life-time of my sister without leaving any issue then I give and devise his share and interest in the property devised to my sister, her heirs, &c., and assigns, absolutely.'" "We are bound," he said, "in construing a will to consider the whole devise together, and it is clear from the latter clause that the sister was not to take as being the surviving joint tenant, but was to take only upon the death of her brother without issue during her life-time; showing that the intention was to create a tenancy in common." There are no words in the will of the testator in this case, as I interpret it, indicating any intention on his part that the children of Mrs. Fisher were to take her share as tenants in common. I am of opinion that they were to take that share as joint tenants with each other, and that all the right and interest which Henry Anderson Fisher had therein passed, at his death, to his two brothers him surviving, and not to his father as his representative. Such being my view of this case, I think the appeal from the judgment of the Equity Judge ought to be dismissed with costs.

SMITH, J., concurred.

RITCHIE, E. J.—Mr. Rigby, on behalf of Mr. Fisher, fully concurred in the position that, unless there were to be found in the will words to indicate that Mr. Anderson intended the issue of his daughter, Mrs. Fisher, to take in severalty other than those in the clause by which he directs the mode of disposing of his estate at the expiration of four years from his death, the issue would take as joint tenants. After giving every attention to Mr. Rigby's argument, I fail to discover any indication of such an intention. When the division and ultimate disposition of the estate were to take place no interest had vested in Mrs. Fisher; her issue then living took as a class, not under her, but directly, under the terms of the will. The bequest is treated strictly as joint; the only severalty indicated is that of the respective shares, one of which is to be set off to each child of the testator and one share to the issue of each deceased child, the issue of such deceased child standing in the place of such deceased child, and from thenceforth a specific account was directed to be kept by his trustee of each share and of the interest and profits thereof, &c., &c. What was mainly relied on as shewing such an intention on the part of the testator was his direction in a subsequent part of the will that the share of each of his daughters should remain in trust during her natural life, the interest of which she was to receive so long as she should live, and that on her death her share, if she should leave children, should be apportioned, $10,000 in such manner as she should appoint, and the balance be paid and distributed to and among her children and grand-children in equal shares, the grand-children standing in the place and being entitled to the share or shares of their deceased parent or parents respectively. No argument can, I think, be drawn from this provision. It has no relation whatever to the issue of a daughter who died within the four years, and who herself never took under the will, but applied only to those who survived and took under it. And even in that case, while the children would take their shares in severalty, the grand-children, taking the share of their parent, would take it jointly. It can hardly be considered a good argument that, because the testator in one case used language which clearly gives a joint tenancy, it is to be inferred that he meant to give a tenancy in common

from having used different language when making disposition of other parts of his estate under different circumstances.

The temporary provision made for his children by the testator, and for the issue of such as might die previous to the period of distribution, was referred to as indicating an intention on his part that the issue should take their share as tenants in common. It would be most unreasonable to make such a temporary provision as this control the words under which their share was bequeathed to them. In the case of *Crooke* v. *DeVandes*, 9 Ves., 206, there was more force in the contention that words which would otherwise have created a joint tenancy, should be held to create a tenancy in common, because the interest on the sum bequeathed was to be divided; but the Court held that it did not follow that because there was a tenancy in common in the interest there was also in the capital. The only other argument used in the support of Mr. Fisher's case, was that the will provided that the issue of Mrs. Fisher, being of the age of twenty-one, or when they should respectively attain that age, should be severally entitled to receive for their own use the whole of the interest and profits of the share and proportion to which they might be respectively entitled, which it was contended was an estate in joint tenancy; and *Woodgate* v. *Unwin*, 4 Sim., 129, was cited in support of this. If the rule acted upon in that case were good law as regards estates created by will it would not apply here, for there the Court held that it was contrary to the rule of law that persons who are to take at different times can take as joint tenants; the property must vest at once, and, from necessity, the persons who attained twenty-one must take as tenants in common. Here the property vested at once at the expiration of four years from the testator's death. If it did not, and only vested in the issue as they respectively came of age, then the child of Mrs. Fisher who died while an infant never had an estate vested in him, and his father could have no pretence for making the claim he does. But the rule that the interest of joint tenants must vest at the same time does not apply to wills. *Theobald on Wills*, 204. In *McGregor* v. *McGregor*, 1 DeGex F. & J., 63, the Vice-Chancellor had held that the issue in that case took as tenants in common on the ground that the estate of joint tenants must vest at the same time, and they took a vested interest at different times.

WEATHERBE, J., read the following dissentient opinion:—

Testator uses general introductory words, expressive of his intention respecting the residue of his estate, and then, in directing his executors as to their proceedings on the expiration of four years from his death, uses the following words:— "Shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue them then surviving, shall amount to, and shall apportion and set off one such share to each of my then surviving children, and one such share to the lawful issue of each of my then deceased children whose lawful issue shall be then surviving, all the issue of such deceased children standing in the place of such deceased child." The words, "one such share to the lawful issue of each of my then deceased children whose lawful issue shall be then surviving," confine the whole of a share exclusively to the issue of each deceased child, and nothing more, but as the share of each child might be subject at the time of division to a diminution in respect of certain charges against it, according to a direction in the will, the last words of the above clause were necessary to assign the several families of children each to its respective parent.

Merely giving a thing to two or more by will gives it to them as joint tenants. This clause is without words importing severance, and gives to the children of Mrs. Fisher, (who died before the division,) the share she would have taken, as joint tenants. Without looking to the other clauses of the will, this case would much resemble that of *Bridge* v. *Yates*, cited by the learned Judge in Equity in the judgment appealed from. The Vice-Chancellor there said; "Then the testator directs the trustees after his wife's death, to stand possessed of her share, for, and to be equally divided among all and every his children who should then be living, and the issue of such of them as should be then dead; such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. The issue would therefore have taken their deceased parents' share as tenants in common with the surviving children. But the testator speaks of no division amongst the issue themselves, and therefore my opinion is that they take their parents'

share as joint tenants with each other." The equal divi
among the children and issue was directed by the testato
that case, with a view to secure to the family of a dece
child only that portion of the estate which would have g
to the parent, and evidently nothing whatever was indic
by testator of an intention to direct as to a division am
the grand-children equally or otherwise.

We are required, however, to examine the will, to se
there are any words importing a division, and the Cour
seems, is not bound altogether by the ordinary rules of
struction, but we are "to incline against a joint tenancy"
"lay hold" of everything which seems to favor a tenanc
common.

Of the state of the law relating to this question in
United States, KENT, (vol. 4, p. 368,) says; "As estate
joint tenancy are so much discouraged by the statute law
this country, and the doctrine of survivorship is in so man
the states exploded, even where joint tenancy with its o
unimportant incidents may continue to exist, the many q
tions in the books arising upon the construction of the w
of a deed or will operating to create the one or the o
tenancy become comparatively unimportant. In Engl
these words still retain their importance."

In the introductory words mentioned and immedia
preceding the clause just discussed, testator declares it t
his will, subject to the provision already made, that "
residue and remainder and interest and increase thereof, s
be distributed, settled, paid and disposed of, to and among
children alive at the time of division and appropriation
shares thereinafter directed, and the issue then living of
of his children as may be then dead, at the times and in
manner following." Do the words, "distributed," "p
disposed of," and, "to and among," apply in the sens
importing division to "the issue" as well as the "childr
Divide," "apportion" and "set off," are the terms use
disposing of the shares in the clause first considered, so
these words, "distributed," "paid" and "disposed of," ca
be said to indicate the same act required of the executor
is directed by the before-mentioned words. Besides,
not the clause show that the distributing, paying and dispo

of, are acts which are to follow the division and apportioning and setting off of the "shares." These words, "distributing," paying" and "disposing of," as well as the words, "to and among," are words importing division. If the testator had said, "I direct my executors to divide my estate into as many shares as there are children living, and deceased children, leaving issue, and to apportion and set off one such share to each of my children living, and one to the issue of each deceased child," this would create joint tenancy as to the issue, but if he had added, "I direct that such shares shall be distributed, settled, paid and disposed of, to and among my said children and the said issue, as directed by my will," I think this would have changed the case and created a tenancy in common. Has this testator in effect by the general introductory words considered, done what I have suggested by the above arrangement of the words?

Previous to entering on what testator calls the "ultimate division" of his estate, he makes a provision for applying a portion of his estate for the use of each of his children, and at the same time sets aside a like amount for the issue of any deceased child. Even if no part of the money involved in the present enquiry is to be paid under the clause it seems to me to have an important bearing in the case. This is the clause; "Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars to be paid by half-yearly instalments to such of my children as shall be of age, or be married."

These children of Mrs. Fisher, after the death of their mother, were entitled to have placed to their credit, of testator's estate, sixteen hundred dollars per annum till the time of division. The mother was entitled to have this paid to her in her life-time in two half-yearly payments because she was married, and possibly also because she was of age; but neither would a child of testator, under age or unmarried, nor a grand-child, be entitled to *payment*. And so, at the time of division there was, I suppose, found placed to the credit of Mrs. Fisher's children this sum of money which I am *to assume* remains subject to the opinion of the Court as to

whether or not it shall be paid to Mr. Fisher. As to this sum, then, was the deceased child, Henry Anderson Fisher, a joint tenant or tenant in common as to this part of the estate? There can, I think, be no question about this. The words of gift are "then a like sum to and among the issue of the child so dying." Mr. Justice PARKER in the case of *Heathe* v. *Heathe*, 2 Atk., 125, decided in 1740, said; "It has been held these two hundred years that 'share and share alike' create a tenancy in common. The words of the second will are not quite so clear and yet are pretty clear too; 'to and amongst all the children respectively, male and female, of her brother and sister Heathe.' I should think the word, 'respectively,' would separate the estate and make a tenancy in common, for, notwithstanding my Lord Chief Justice HOLT leans so strongly to joint tenancy, yet courts of Equity are very far from favoring it so much." There seems to be no distinction between courts of Law and courts of Equity on the subject in these times. The effect of the words, "to and amongst," seems in that case to have escaped the attention they afterwards demanded and still demand.

In 1792 it was held in the case of *Campbell* v. *Campbell*, 4 Br. C. C., 15, that where in a will as to a residue two-thirds were given "to and amongst" the children of A and B, they took as tenants in common, but the remaining third being given to the children of C, they took as "joint tenants;" and this has ever since been law.

In the case of *Robertson* v. *Fraser*, L. R. 6 Ch. App., 697, Lord HATHERLEY discusses the effect of the word "amongst," and, as the case is otherwise applicable, I may mention what it was. A joint tenancy, beyond all doubt, was created by the will. The testator as to the rest and residue of his estate gave the same unto A and B for their own absolute use and benefit. By codicil he recites the appointment of A and B as his trustees and executors and appoints C an additional trustee and executor, and declares that his will "shall be read and construed as if the names of A, B and C were inserted herein throughout, instead of the names of A and B, and as if in the bequest of his residuary estate and effects the names of the said A, B and C were inserted in such bequest instead of the names of the said A and B, so that C shall and may *parti-*

ch bequest, free from legacy duty with the said After the death of the testator, who survived A, for the administration of the testator's estate the rose whether the effect of the codicil was to give tors a joint tenancy or tenancy in common. The ncellor decided for tenancy in common. The whole ed on the word "participate" in the codicil. Several re cited, and Johnson's, Webster's, Richardson's and s Dictionaries were referred to on the argument on n the word "participate." Lord HATHERLEY, in giving nt, said he would feel no difficulty if the clause had d in the original will. He said, "I cannot doubt, regard to the authorities respecting the effect of words as 'amongst' and 'respectively,' that anything in the slightest degree indicates an intention to divide roperty must be held to abrogate the idea of joint tenancy. aps it would have been well if the courts had held that equests as in partnerships every community of interest to be considered a tenancy in common, but that has not n done. However, putting aside such words as 'alike' and ually,' for they may be considered more decidedly incontent with joint tenancy, inasmuch as the interests of joint ants are very rarely quite equal considering the differences at may exist in the ages of the legatees, it does not appear me that such words as 'amongst' and 'respectively,' are at stronger than 'participate.' I have, therefore, no doubt at the word 'participate' is sufficient to indicate an intention to divide. There is a fallacy in the argument when it is ntended that the testator shews no intention to alter the ll because he does not interfere with the form of the bequest. e testator is not altering the will, he is only explaining it. uses words which the Court allows to be explained by ry slight indications of intention, and, having used them, he es on, not to alter them, but to explain them by words ewing an intention to create a tenancy in common."

The question has been settled as to the effect of the words o and among," used as they are in the will before us, and e deceased child was, I must conclude, a tenant in common to what was set apart or placed to the credit of the issue

of testator's children previous to the expiration of four years from his death.

Why was this sum of sixteen hundred dollars annually to be placed to the credit of the issue of a deceased child of testator, since it was not to be paid over as was the case with his children? It may have been thus directed, so as to equalize the distribution of the estate among his children and the respective families of those who should die, and I suppose at the expiration of four years from the testator's death one of the duties of the executors would be to add any such sum to the share, which, in the event of the death of a child, should be apportioned and set off to the issue of that child. Is this intent, manifested in this gift, to create the grand-children tenants in common as to part of the estate, however, to be weighed in ascertaining the intention of testator in the disposal of the other portion of his property which should fall to them?

In the case of *Crooke* v. *DeVandes* reported in 9 Ves., 200, in 1803, certain interest was by the will given to the grand-sons by words which implied tenancy in common and, further on, the residue of the estate, which was the principal, was bequeathed to the same persons by words which, as in this case, created a joint tenancy. It was contended on the argument that the expression, "what remains," could not refer to the interest which was before given to the grand-sons, and that "the interest is by this will given to them clearly as tenants in common by the effect of the words 'to be equally divided,' and it would be a strange supposition that he should intend them to be tenants in common of the interest and joint tenants of the principal, which must be contended by the plaintiff." Though the whole was declared to pass to the grand-sons as tenants in common, Lord ELDON seems to have had considerable doubt. Here, I think, the circumstance is more clearly indicative of the intention to sever the whole.

Then there is a direction in the will for the keeping of a separate account of the interest and profit of each share, and the payment made for the maintenance and education of each of testator's children or issue is required to be charged against the shares apportioned to such child, or wherein such issue shall be interested, and an intention is expressed that after

the contemplated division the maintenance and education of each child, while under twenty-one years of age, should be drawn from the separate income of such child, and these words follow; "And the maintenance and education of the children of any of my children, who may have before then died leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children." Does this direction to draw money, for which an account is required to be kept, for the support and education of the grand-children from the share set apart for them in case of a death, such as that of Mrs. Fisher, import the keeping of an account of what should be required to be expended for each of such grand-children, and do the words import an intention of division? The word "pay" or "paid" alone has been construed in cases, with apparently not more reason, to import the idea of division.

This testator further directs that his children and such issue of deceased children, being twenty-one years of age, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion to which they may be respectively entitled. Under the principle sometimes adopted by courts in getting at the intention of a testator, by which they consider what he might reasonably have anticipated as to the remoteness of a death, it is fair to suppose that testator would reasonably have considered it probable that his grand-son, Henry Anderson Fisher, in case of his mother's death, would have survived to enjoy the provision made for him under this clause.

By another clause it was directed that in case of the death of a married daughter leaving children, $10,000 of her share should be subject to her discretionary appropriation, and the balance should be paid, apportioned and distributed to and among the children and grand-children in such proportions as she should direct and appoint, and, in default of such appointment, to and among her children and grand-children in equal shares. It was contended that as there would be no doubt that in case Mrs. Fisher had survived the period of distribution, her children would, in the event of her death, take as tenants in common, this clause should be read as showing the intention

of testator towards those children, and these words should be called to our assistance in construing the other clause. It was said this clause was introduced in contemplation by the testator of the death of a daughter at a remote period when she might leave grand-children, and no doubt it may have been; but does it not apply with equal force respecting the testator's grand-children, and was it intended to operate from and immediately after the expiration of four years from testator's death? There is nothing, I think, to indicate whether any of testator's other daughters may not at the date of the will have had grand-children.

These views seem to me to cover all the ground over which the discussion has ranged, and I am brought by the examination of the case with the will and authorities to incline to the view that the portion of the estate belonging to Henry Anderson Fisher at his death, by reason of his being a tenant in common, vested in his father. I am alone, however, for sustaining the appeal.

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1879, TO MAY 1880.

BLOIS *v.* RICHARDS.

DEFENDANT, brought before Justices of the Peace on a charge of selling intoxicating liquors contrary to law, obtained a continuance after the investigation had been partially gone into, alleging the absence of a material witness. Before the day to which the trial was continued by the Justices he sued out a writ of *certiorari* to remove the proceedings to the Supreme Court. A rule *nisi* was obtained to quash the *certiorari*, which was served, not on the attorney whose name appeared on the præcipe for the writ of *certiorari*, but on his late partner. No attorney's name appeared on the writ itself. Nothing was done on the return day of the rule *nisi*, but afterwards a rule was obtained from a Judge at Chambers to enlarge it, and have the cause placed on the docket for the then next Term. On the argument of this rule the attorney of defendant stated that he did not appear to shew cause, because the rule, as he contended, had not been served, and that, if the service was held to be good, he wanted an opportunity to appear.

Held, that the objection to the service of the rule had been waived by the attorney appearing, and that, no authority being shewn to justify the issuing of the *certiorari* after the commencement of the investigation and before judgment, the grounds disclosed in the affidavit for *certiorari* being merely formal or frivolous, and the Supreme Court having no power to try the cause anew, as its summary jurisdiction had been abolished, the *certiorari* should be quashed and the cause remitted to the Justices.

Q. Whether the writ of *certiorari* was not defective for want of the name of an attorney?

WEATHERBE, J., dissenting, held that the original rule *nisi* had expired, and could only have been revived by a motion in Term, a Judge at Chambers having no power to deal with the subject; and, further, that there had been no waiver of the want of service.

THIS was a *certiorari* before judgment. The defendant was sued for selling liquor contrary to the law. During the progress of the trial, which took place before two Justices of the Peace, the defendant's counsel applied for a continuance, upon an affidavit alleging the absence of a material witness. A continuance was granted for a week and, on the day after it was granted, the defendant caused to be issued a writ of *certiorari* to remove the cause into the Supreme Court. A

rule *nisi* was subsequently obtained to quash the writ of *certiorari* on several grounds, but was never served on the attorney whose name appeared on the præcipe for the writ of *certiorari*, though it was served on his late partner. This rule *nisi* was enlarged by a rule made after the return day of the original rule. The cause was argued January 27th, 1879, before SIR W. YOUNG, C. J., and DESBARRES, MCDONALD and WEATHERBE, JJ.

Parsons, in support of rule.—The defendant, as one of the grounds of his *certiorari*, swears that on the trial of the cause he wants to raise the legal point whether a summons is good which alleges a "sale to a nominal defendant." That is meaningless as it stands. It probably means, "to a person not in existence," and the defendant makes no attempt to shew that the person named in the summons was not in existence. The second and third grounds need not be mentioned, as they are clearly met by sections of the Revised Statutes, chapter 75. The fourth ground, so far as it can be understood, raises the question whether a summons is good which charges a sale to a particular person. It is true the Act of 1876, (chapter 1,) gives a form of summons, substituted for that in the schedule to chapter 75, Revised Statutes, in which there is no allegation of sale to a particular person, but the allegation is now merely surplusage, and a matter of form, and a subject of amendment. (WEATHERBE, J.—The defendant swears that the summons was issued and the trial commenced at a place thirty miles distant from his residence, where the offence was alleged to have been committed, passing by eight Magistrates within ten miles.) The plaintiff had a right to do that under the law, and it is done every day. (Reads affidavits of service of the rule *nisi* upon the defendant in person.)

Longley, contra, states that he does not appear to shew cause, that his name appears on the præcipe for the writ of *certiorari*, that the original rule *nisi* to set aside the *certiorari* was never served upon him, and that the rule *nisi* has been enlarged and no service made of the enlarged rule. Cites *5 C. B.*, 420. (YOUNG, C. J.—You should have called attention to this before we spent time in listening to the argument. *Bliyh* had no authority to appear for me or act for me. W.

had dissolved partnership. (YOUNG, C. J.—I would be very sorry to lay down as a principle that service on counsel is enough. I look at the special circumstances of this case. MCDONALD, J.—I am not aware that there is an attorney in this case at all. YOUNG, C. J.—What does this enlargement rule amount to?) If this is held to be a good service I want an opportunity to appear.

WEATHERBE, J.—I am prepared to give my opinion now on the question of service. If we come to the conclusion that there has been a service we will call upon the other side.

YOUNG, C. J.—I assent to that.

MCDONALD, J.—I don't assent to it.

MCDONALD, J., now, (December 9th, 1879,) delivered the judgment of the Court:—

The plaintiff, Clerk of License for East Hants, sued the defendant, before two Justices of the Peace, for selling intoxicating liquors, contrary to law, to one Samuel Crow, and on the return day of the writ of summons no sale to Crow was proved, but evidence was given that a girl sold such liquors to another person on the premises occupied by the defendant, and evidence was also given of a sale by the defendant himself. He then made application, on affidavit, for an adjournment of the trial under chapter 75, section 37 of the Revised Statutes, to enable him, as he then alleged, to procure evidence in rebuttal, which application was granted; but, on the following day, and before the day appointed to resume the trial, he caused the writ of *certiorari* now under consideration to be issued, and the cause was removed to this Court. The grounds disclosed in the affidavit for the *certiorari* are mere formal objections when they are not frivolous, and are cured by section 12, chapter 1, Revised Statutes, which provides that when forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them. No authority has been cited to justify the issuing of a writ of *certiorari* to remove proceedings in a cause like this from an inferior Court after the commencement of the investigation and before judgment in that Court; and I would regret it if we were obliged to establish such a precedent in a case like this, in which the evidence, so far as it was taken,

is strongly against the defendant. If, as he states in his affidavit for a continuance of the trial, he could get witnesses to rebut the evidence given on behalf of the plaintiff, he should have produced them before the Justices of the Peace whom the law invests with the power of deciding, in the first instance, both the law and the facts bearing upon the case; and, if not satisfied with their decision, he had the remedy pointed out by the statute, to appeal, not to this Court, but to the County Court, where the cause might be tried anew, and where, again, he could have the benefit of any defence which he could successfully set up, whether on questions of law or of fact. This Court has no power to try the cause anew, in a summary way, the summary jurisdiction of the Court having been taken away by the Act establishing County Courts. To uphold this *certiorari* at this stage, as the case is presented to us, would be, in my opinion, to assist the defendant in defeating the ends of justice and evading the intention of the statute which points out his remedy,—a remedy of which he at the time might, and yet may, avail himself if he can honestly make the affidavit required by the statute to enable him to appeal. I am therefore of opinion that the *certiorari* must be quashed, and the cause remitted to the two Justices of the Peace who tried it, to enter judgment as they should have done if it had not been removed to this Court.

The objection taken to the service of the order to enlarge the rule *nisi* is not entitled to much weight. If there was an irregularity in the service the objection is waived by the defendant, by his counsel, appearing to shew cause. See *2 Chitty's Archbold's Practice*, 1582, where it is said that, in cases where personal service of a rule is required any irregularity in it is waived by the party appearing to shew cause against it. No difficulty could have arisen, on that ground, if the defendant or his attorney had signed the writ of *certiorari* as I think our Practice Act, section 25, intended; and I am very much inclined to the opinion that, for want of such signature, the writ itself is defective.

Since the foregoing was written I took the trouble to look further into the question of waiver, and the result of my enquiry leaves not the shadow of a doubt upon my mind that

the view above expressed is entirely in accordance with law and English practice. In *Levy* v. *Duncombe*, 3 Dowl., 447, it was held, not simply that a party appearing by counsel and objecting on the ground of want of proof of personal service of a rule *nisi*, had by his appearance waived the objection, but it was so held although the rule *nisi* was for an attachment and it was clear that it had never been personally served at all. The report of that case is very short, and to avoid any misunderstanding, I will give it in full:—

"A rule *nisi* had been obtained at the instance of the plaintiff for an attachment against his late attorney for not having delivered a bill of costs, pursuant to a Judge's order for that purpose, and which had been made a rule of court and personally served. *Humphrey* and *Hughes* showed cause and objected that the rule could not be made absolute because the affidavit of service did not state that the rule *nisi* had been personally served, which, it was contended, was necessary, and there had been an affidavit contra that there had been no personal service."

"Lord ABINGER, C. B.—The rule *nisi* is served merely for the purpose of bringing the party here. If he appears, as he does by his counsel, that obviates the necessity of enquiring whether the service of the rule *nisi* was personal or not, though if no one had appeared the court would probably not have made the rule absolute for an attachment, except on an affidavit of personal service. The contempt for which an attachment is prayed was in not obeying a previous rule which has been personally served.

"PEAKE, BOLLAND and GURNEY, Barons, concurred.

"The merits were not gone into, all the matters in difference being referred to a master, and it was ordered that the attachment should not be drawn up for a month."

The merits here referred to,—that is, the matters in difference which were referred to the master,—could not have been the question of whether or not the rule *nisi* for attachment ought to be made absolute. Clearly, if the case was correctly reported, the rule was made absolute at the time, although its operation was suspended for a month, pending, as we may fairly assume, the investigation into the matter of the costs in question.

It is true that the reporter, in a note of his own, suggests that the case is at variance with other cases cited by him, in one of which an imperfect copy of a rule *nisi* was served, and it was held that the opposite party did not, by appearing to take that objection, admit that he was rightly brought into Court, and in the other of which it was held that appearing and using affidavits in opposition to a rule did not waive an objection to the title of the affidavit on which the rule was moved. I fail, however, to see that there is the slightest conflict between these decisions. In the first case cited by him service was admitted, but it was service of a defective paper, and in both cases the questions were not questions of waiving service but of waiving defects in the papers served.

In the case of *Levy* v. *Duncombe*, as in the one now for decision, there was no question whatever touching defects in the papers alleged to have been served, but the questions were simply whether they were served or not, and, if not served, whether there was a waiver of the service, which would be otherwise required.

SIR WILLIAM YOUNG, C. J.—I have looked carefully into this case and concur in the judgment just delivered.

WEATHERBE, J., delivered the following dissentient opinion:—

A rule *nisi*, without date, to quash *certiorari* proceedings was made returnable before this Court on the 24th March, 1877, and, as no motion was made thereon, expired on that day. By sec. 2 of cap. 94, of the Revised Statutes, (4th series), in all such cases the practice of this Court shall conform to the practice of the Superior Courts of Common Law in force previous to the first year of King William IV, and, where the practice of these Superior Courts differ from each other, that of the Queen's Bench shall be followed. We must go back then to the practice as it existed in 1829. The ninth edition of *Tidd* brings the practice down to 1828. That author, in dealing with rules *nisi* like this one, returnable here on the 24th March, 1877, says: "But the matter frequently stands over by consent of parties, or for the accommodation of counsel, till a subsequent day, when the counsel on either side may

bring it on by moving to make the rule absolute, or discharge it; though if not brought on or enlarged during the same term *it is of no effect unless revived*, as it may be in any future term upon *being served anew* and *motion made to revive it.*"

This never was served anew, and no motion was made to revive it.

This is what was done: On the 12th day of June, 1877, two months and eighteen days after this rule *nisi* had expired, a Judge at Chambers made an order "to enlarge the rule *nisi* herein and have the cause placed on the docket for the next ensuing term." Except these two rules we have nothing whatever before us after the 24th May, 1876, the date of the issue of the writ of *certiorari*. There is no return to the *certiorari*, and no affidavit of the service of either of these rules was produced, though I called attention on the argument to the absence of all proof of service.

We are asked now to make absolute this rule *nisi* without date. I am unable to perceive how we can do so under the practice of this Court. When I observed that the rule *nisi* in question had expired, that it had never been served anew, that no motion had ever been made to revive it, I thought, with all deference, that that was the end of this case under the present motion and application.

It is said now, I understand, that Mr. Longley, for the defendant, having appeared to shew cause waives any failure of service. The reporter's note of what happened on the argument agrees with my own, to the effect that Mr. Longley stated at the bar that he did not appear to shew cause, and, after the question of service had been mentioned, he requested, that if this should be held to be good service he should have an opportunity of appearing. My learned brethren, holding that this statement of the learned counsel constituted an appearance to shew cause, rely on the case of *Levy* v. *Duncombe* to hold this a waiver. Although this appears to me beside the question, I cannot come to the same conclusion respecting the authority relied on. Our act carries us back to the practice in England as it was previous to 1830. Dowling, the reporter, only commenced to report in the first year of King William IV, and went on reporting till the 6th Victoria alone, and long afterwards with Lowndes. *Levy*

v. *Duncombe* is reported in the 3rd volume of Dowling, 447, in 1835. This was in the *Bail Court*, which is merely an auxiliary Court. Our Legislature has imposed on us the duty of looking to Superior Courts of Westminster. These are the Courts of the highest and most extensive jurisdiction, and include, I understand, only the Court of Chancery, Queen's Bench, Common Pleas and Exchequer. I mention this because I am unable to look for our practice to any other source than that pointed out in the Statute. Moreover, this case of *Levy* v. *Duncombe* was an application for an attachment for not having delivered a bill of costs pursuant to a Judge's order. In the King's Bench, as I understand it, the rule for an attachment is in many instances absolute in the first instance as it is in the Exchequer or Common Pleas. In the case mentioned the attachment was for not obeying a Judge's order which had been served, and in that case a rule absolute for the attacment might have passed with reason. We are not dealing with cases of attachment, and the authority referred to would not, it seems to me, be of assistance if the difficulty was in this quarter. My difficulty is not with the want of service of this rule of a Judge at Chambers, nor indeed with service in any sense. If the original rule *nisi* had been properly dealt with in time by obtaining an enlargement the practice would be clear enough, for it does not, or did not previous to the first year of the reign of King William the Fourth, seem to be necessary to serve enlarged rules at all, because, as it is said, both parties were required to be before the Court. But this rule *nisi* which we are now asked to make absolute has expired. It expired many weeks before the alleged order enlarging it is dated. The term of this Court at which it was made returnable had expired without any application having been made to revive it. It could, in my opinion, only have been revived by a new service, and a motion in term to revive it. I am entirely unable to see how a Judge at Chambers could deal with the subject. No authority was cited for such jurisdiction, and I am not aware that any can be found.

IN RE CREIGHTON.

Under the Insolvent Act of 1875, a creditor for an amount less than $100 cannot oppose the confirmation of an insolvent's deed of composition and discharge. WEATHERBE, J., dissenting.

The fact that the Insolvent was second cousin of the Judge's wife, held not to disqualify the Judge from dealing with the matter.

THIS was an appeal from an order of J. W. JOHNSTONE, Esq., Judge of the County Court, District No. 1, discharging the above named Insolvent. The Insolvent's discharge was opposed by one C. F. Mott, a creditor for an amount under $100, viz., $19. The Judge gave an order granting the discharge, with costs against Mott, holding that Mott had no right to oppose it. An appeal was taken from this judgment and argued March 15th, 1879, before SIR W. YOUNG, C. J., and DESBARRES, JAMES, and WEATHERBE, J J.

Bell, in support of appeal. The first ground of appeal here is that the Judge was disqualified by relationship; *Regina* v. *Rand*, L. R., 1 Q. B., 232; approved in *Reg.* v. *Meyer*, L. R., 1 Q. B. Div., 176; *1 Knapps' P. C. C.*, 376. The last case decides that relationship by marriage is equally a cause for setting aside a judgment with relationship by consanguinity. See also *Lynds* v. *Hoare*, 1 R. & C., 327. The limitation as to jurymen is relationship within the ninth degree; here the relationship is of the sixth degree, the Insolvent being second cousin of the Judge's wife. Cites *12 Coke*, 114; also an anonymous case cited in *3 H. of L. C.*, 793.

The 53rd section of the *Insolvent Act of 1875* defines the creditor who can assent to discharge to be one whose claim is over $100, but it does not limit the creditors who can oppose the discharge. These clauses, taking away the common law rights of creditors, must be construed strictly. See also sec. 56.

Motton, *Q. C.*, and *Meagher*, contra, were not called upon.

SIR WILLIAM YOUNG, C. J., (December 9th, 1879,) delivered the judment of the Court:—

On a petition for confirmation of a deed of composition and discharge of the insolvent, Charles F. Mott, a creditor for $19 and odd cents, appeared to oppose the discharge, and the

first question is; had he a right to interfere under section 1 of the Act, and sub-section of section 2. The right of consen ing to a discharge belonged to creditors for the sum of $1(and upwards, under the Ontario *Insolvent Act of 1864*, se tion 9, and under the Dominion Act of 1869, section 94, a now belongs to such creditors under the above sub-sectic By section 119 of the Act of 1869, in a case therein specifi the proportion of creditors required to give validity to any vo act or document, may be completed by the votes or concurren of creditors holding claims less than $100, a provision not to found in the Act of 1875, and on a purview of the whole statu the right of creditors to oppose as well as to assent to a deed composition and discharge of an insolvent, appears to to be limited to creditors for sums of $100 and upwar What the grounds of Mr. Mott's opposition were does n appear in the papers before us. The preliminary objecti taken by the counsel was that the Judge of the County Cou was a second cousin of the insolvent by marriage. If this a sound objection, extending, as the counsel for the appella told us at the argument, to the sixth degree, this remc relationship to any of the numerous creditors of an insolve would defeat his discharge and oblige him to resort to t Judge of an adjoining County. Most of the cases on tl point, and they are very few, were well put by Mr. Bell, a have been reviewed by the Court. The strongest case *1 Knapp's Reports, P. C.*, 376, that of the nephew of a deceas wife, depended on the ancient law of Normandy, which w the law of Jersey where the question arose; but if the ca occurred here, a Judge, with the delicacy constantly observ on the part of Judges, as recognized by *Chitty's General Practi* vol. 3, p. 9, would refuse to act, and there is no danger of a Judge incurring the suspicion of partiality or bias.

It is nowhere laid down that the disqualification of a ju *propter affectum*, as detailed in *12 Coke*, 114, and in *Archbo* 435, should extend to the Bench. Nor would it be wise in t Court to define the limit of relationship which should disqual a Judge. It is enough that in this case we think that 1 Mott's opposition cannot be upheld, and that the appeal mu be dismissed with costs.

JAMES, J.—Section 2 of the Insolvent Act defines the general meaning of the word "creditor," and then goes on to define the meaning of the term when applied to several particular transactions, none of which includes the discharge of an insolvent by the Judge after his deed of composition has been perfected. For these purposes the creditors entitled to act are creditors over $100, but for all other purposes any creditor has a right to come in and protect his interest; otherwise the Act would have stated plainly that the word creditors, for all the purposes of the Act, should mean creditors over $100. The only difficulty I feel in sustaining the right of any creditor to oppose the discharge arises from the fact that the definition of "creditor" in section 2 is not confined to creditors who have proved their claims, but, upon the face of it, extends to all creditors. Section 53, which requires notice of the application to be given, is as follows; "And such notice shall be given by one advertisement in the *Royal Gazette*, and also by letter or card postpaid, addressed to each of the creditors by mail." Now, if a special notice is to be given to each creditor, and any creditor is omitted who has not seen fit to send in a claim, and whose very existence may be unknown to the assignee, the discharge will be of no value whatever, because the want of notice to any single creditor will give him a right to apply to have the order set aside. I can see strong reasons why every creditor should have that right, and I think it a defect in the Act that it is so framed as not to give the right. But I cannot construe the Act in that way. I concur with the opinion of the learned Chief Justice on both grounds.

WEATHERBE, J., delivered the following dissentient opinion:

This is an appeal from the learned Judge of the County Court for Halifax, argued before the learned Chief Justice, my brothers DESBARRES and JAMES, and myself, last Term. Application was made to the Judge, under the provisions of the Insolvent Act of 1875, by William H. Creighton, for a confirmation of his deed of composition and discharge. Section 53 says of such application to the Judge that "upon such application *any creditor* of the insolvent * * * * may appear and oppose such confirmation." Charles F. Mott, a creditor of the said insolvent, did appear under said clause *to oppose such confirmation*.

A question was raised respecting the relationship of the Judge upon which I need not dwell, as I think the Judge had jurisdiction. Mr. Motton, on behalf of the petitioner, (Creighton,) interposed, and questioned the right of the creditor, (Mott,) to intervene, because his claim was below $100. It will be observed that the law says that "any creditor" may interfere, but, to put the matter beyond doubt, as I thought, section 2 of the Act defines the word creditor by enacting that "the word creditor shall mean every person * * * * to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety." An exception is made in section 2, limiting the meaning of the word creditor for certain purposes, (of which this is not one,) to cases where the liability is $100 and upwards. The cases where the meaning is so limited are, "in reference to proceedings at meetings of insolvency," "to the right of voting," "to the execution of a deed of composition and discharge," "the consent to a discharge of an insolvent or *any other consent* or action with regard to the management or disposal of the estate of an insolvent."

Notwithstanding this, the learned County Court Judge declined to take into consideration the objections of the creditor, Mott, which he appeared to set up to oppose the confirmation. The learned Judge uses this language,—and I am not able to see how he could have used any better mode of argument in deciding to reject the application of the creditor to oppose the confirmation. These are the words of the judgment appealed from; "Though the words *any creditor*, in section 53, would at first sight seem to confer upon *any creditor* the right to oppose a discharge, yet I am inclined to think that the *right is limited* to that class of creditors who have proved claims to $100 and upwards, and for the following among other reasons; first, section 2 limits the right of voting *executing a deed of discharge*, the *consent to a discharge*, or any consent or action in regard to the management, etc., of an insolvent estate to those creditors who have proved claims to $100 or upwards. * * * Had, after the word *consent*, in section 2 the words *or oppose* been inserted, no question could have arisen, and I think that, to carry out the intention of the statute, I am justified in reading those words in this connection"

Because the Legislature, after enacting that any creditor may appear before a County Court Judge and oppose a confirmation of a discharge, in express terms shuts the door of that Court to a creditor "consenting to a discharge" of the insolvent, the learned Judge decides to shut the door to one "opposing a confirmation of the discharge," and he does this by adding the two words, "or oppose," to the word, "consent," in the Act. I may point out that to arrive at the conclusion in the judgment appealed from, other words seem to be required to be added than those the learned Judge proposes, viz., "or opposition to the confirmation of." But I cannot understand upon what principle of construction we can so deal with the language of the Legislature as to add any words whatever to this statute, and I have come to the conclusion that, inasmuch as the construction we are asked to put upon the statute is against all rule, the judgment below should be reversed.

BARRETT *v.* THE ISOLATED RISK INSURANCE CO.

DEFENDANTS, in an action on a policy of insurance, pleaded, with fifteen other pleas, *nunquam indebitatus*, and two pleas alleging that the action had not been brought within six months, as required by a condition in the policy; but there was no plea denying the making of the policy. Plaintiff, relying on the want of a plea traversing the making of the policy, did not put it in proof, and defendants failed to produce it to prove the condition.

Held, that the plaintiff could not be put to the proof of the policy by the plea of *nunquam indebitatus*, but that, under such plea, though perhaps demurrable, the defendants might have given evidence of the alleged condition, had they been in a position to do so.

Q. Whether the plea of *nunquam indebitatus* is not bad.

THIS was an action on a policy of fire insurance. There were eighteen pleas pleaded, setting up various grounds of defence, but no plea directly traversing the making of the policy. There was a plea of never indebted. The cause was tried at Halifax, in November, 1878, before Mr. Justice WEATHERBE, (without a jury,) who found in favor of plaintiff for the amount claimed, and granted defendants a rule *nisi* to set aside the finding, on the ground that it was against law and evidence. The cause was argued March 12th, 1879, before Sir W. YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, J J.

Wallace, in support of rule,—*1 Saunders on Pl. & Ev.*, 905; *3 Bing. N. C.*, 824. These authorities shew that even under the statute abolishing the plea of *nil debet*, yet if it is pleaded and not demurred to, it is not a nullity, but will let in the defences formerly allowed under it. Of course it would not be a defence in an action of assumpsit. *16 Exch.*, 136; *Barton's Precedents*, 156; *1 Chitty's Arch. Pr.*, 291; *5 Ad. & El.*, 17; *6 M. & W.*, 618; *5 Dowl.*, 688; *1 Ch. Pl.*, 547. Our plea of "never indebted," therefore, is sufficient to put the policy in issue, and the plaintiff cannot succeed, not having proved the policy.

Motton, Q. C., with *Wallace*.—There is a plea here setting up certain conditions of the policy which were not fulfilled by plaintiff, and that is not denied by plaintiff; plaintiff's joinder of issue is not a denial, but merely a re-affirming of his former allegations.

Rigby, Q. C., contra, not called on.

DESBARRES, J., now, (December 14th, 1879,) delivered the judgment of the Court:—

This was an action on a policy of insurance for $600 against loss or damage by fire for one year from the 1st of July, 1875, on two dwelling houses and a barn of the plaintiff, situate at Douglas, in the County of Hants. The policy was renewed on the 1st of July, 1876, and again on the 1st of July, 1877 to continue in force up to and ending on the 1st of July, 1878 The two dwelling houses were destroyed by fire shortly after the last renewal of the policy, and the present action was brought to recover the respective sums insured on each. The cause was tried before Mr. Justice WEATHERBE, without a jury, at the sittings of this Court in November, 1878, who, on the evidence produced before him, found a verdict in favor of the plaintiff on the issues raised therein. A rule *nisi* was granted to set this verdict aside, at the argument of which it was contended by defendants' counsel, under the authority of *Finleyson* v. *MacKenzie*, 3 Bing. N. C., 824, and *Rawlins et al.* v. *Danvers*, 5 Esp., 38, that, as the plaintiff had taken issue on defendants' first plea of *nunquam indebitatus*, instead of demurring to it as a bad plea, which he might have done, defendant had a right to give evidence of any matter of defence

applicable to that plea by shewing that he had discharged his indebtedness to the plaintiff, or that in consequence of plaintiff not having complied with some one or other of the conditions in the policy, it had become inoperative and void.

There are no less than eighteen pleas put in by the defendants, stating all conceivable grounds of defence in this case, not one of which was proved. Among these there is no plea denying the making of the policy, but there are two pleas, (17th and 18th,) alleging that the action was not brought within six months after the loss occurred, as required by a condition on the back of the policy. To avoid the operation of that condition, the existence of which, though not expressly admitted, was hardly denied, the policy was not produced in evidence by the plaintiff, and the question is whether the verdict, under the evidence, can be sustained. I think it was open to the defendants, on the issue taken on the first plea, to give evidence of any fact discharging themselves from any liability to the plaintiff. To accomplish that object they might, if they had given timely notice to produce the policy, have given secondary evidence of its contents, but, as the notice served on the plaintiff was ruled to be too short, no evidence to that effect was offered. In the absence of such testimony the Judge decided that the plaintiff was entitled to recover, and we are to say whether he was warranted in arriving at that conclusion.

The merits of the case being entirely with the plaintiff, and there being in point of fact no defence to the action other than that suggested in the pleas no. 17 and 18, which was not proved, I think the verdict ought to be sustained.

SIR WILLIAM YOUNG, C. J.—The plaintiff, in his summons, declares that the defendants were indebted to him for that by a policy of insurance dated July 2, 1875, certain buildings of his were insured against fire to the amount of $600; that the policy was renewed, and, while it was in force, the buildings were destroyed by fire. The defendants put in eighteen pleas, charging at random all sorts of things, none of which were proved, and we have only to deal with the 1st, that the defendants never were indebted, and the 17th and 18th, that the action was not brought within the term of six months

after the loss, which was practically admitted at the argument to be a condition in the policy. To avoid its operation as against what appeared to be a *bona fide* claim, the plaintiff's counsel, availing himself of the making of the policy not being denied by the usual plea, closed his case without producing the policy, and refused to produce it on a notice too short to admit secondary evidence. The plaintiff, under these circumstances, had a verdict, and the question is, can it be sustained? The plea of never indebted continues to be in constant use in this Court, but I have always been inclined to think it bad under our Act.

In *Bullen & Leake*, 461, after referring to the three pleas usually spoken of as general issues in actions on contracts, it is said that the plea of *nunquam indebitatus* is now the only general issue to *indebitatus* counts. By our Act, chapter 94, section 139, the plea of *nil debet* shall not be allowed in any action, which is the 11th rule of Trinity Term, 1853, in England. By chapter 94, section 152, which is peculiar to ourselves and widely separates us from most of the English rules, the general issue and all general pleas are abolished, and every pleading shall specify particularly and concisely the facts intended to be denied,—a wholesome and a wise provision, too often neglected. The plea of *nunquam indebitatus*, therefore, as I think, in all cases, (for it is not among the forms in our appendix,) and *a fortiori* when pleaded to a policy of insurance is *not only demurrable*, but is abolished, and may be struck out as of no avail. The cases cited from *Arch.*, 291, *5 Esp.*, 38, and *3 Bing. N. C.*, 824, shew that a defence may be let in on a bad plea, and had there been a substantial defence here, I would have been strongly inclined to admit it. But the defence, besides being a defence which the Court would not favor, could not be proved without the policy and the fact of the policy and renewals being admitted on the record, having been set out and not denied, I think the plaintiff is entitled to hold his verdict, though, as in the analogous case of a promissory note and bill of exchange, he must file the policy before judgment signed.

PEPPIT *v.* NORTH BRITISH & MERCANTILE INSURANCE COMPANY.

H. P. represented himself to be the agent of the defendant Company, employing sub-agents, effecting policies and paying losses in their name, and it was stated by one of the professed sub-agents of the Company that H. P. was the agent. This was not contradicted by the alleged agent, whose evidence was read at the trial, and who admitted that he had acted as agent of the Company and had sent the preliminary proofs in this case to the Company.

Held, that this was sufficient proof of agency.

The sixth condition of the policy required the insured to give notice of loss in writing forthwith to the agent of the corporation, at his office in Halifax, and to furnish preliminary proof to the corporation in fifteen days. The fire took place January 17th. Plaintiff, residing at Sydney, C. B., where the insured property was situated, went on the next day to the sub-agents, who sent a telegram to the agent, and on January 22rd plaintiff sent the agent a written notice, which he received January 27th. The preliminary proofs were prepared by the sub-agents January 22nd and received by the agent "early in February,"—the agent could not tell the exact date.

Held, that the notice of loss was sufficient, and that the jury might fairly presume that the preliminary proof had been sent in within fifteen days, which did not expire until February 2nd.

The fourth condition provided that no insurance should be considered in force until the premium was actually paid, and that insurance should expire unless the premium was paid on or before the commencement of the succeeding term. The renewal premium was not actually paid till some days after the commencement of the term, which was from January 1st, '75, to January 1st, '76, but in December, '74, a postcard was sent to plaintiff by the sub-agents at Sydney, reminding him that his policy would expire January 1st, and adding, "if you wish it renewed please notify us on or before that day." Plaintiff notified them that he wished it renewed, and received from them a letter dated January, 1875, stating that the policy was marked renewed. The letter, with the exception of the date and number of the policy, was in print shewing a custom of the office thus to mark policies renewed before payment of renewal premiums, and one of the firm of sub-agents at Sydney swore that such a practice had been recognized by the agent at Halifax, and that renewals so effected were understood to stand subject to the agent's disapproval, the sub-agents charging themselves with the amount of the premium in account with the agent at Halifax. This witness stated further that the condition as to payment of renewal premiums was never attended to, and on the previous renewal of this policy the premium had been accepted after the commencement of the term.

Held, that the contract for insurance was valid, the contention having been waived.

The Court will on the argument be governed as to the pleadings by the issue used at the trial.

THIS action was brought on a policy of insurance on plaintiff's building. A verdict was taken for plaintiff by consent, subject to a rule *nisi*, which was argued last Term before DESBARRES, SMITH, JAMES and WEATHERBE, J J.

Johnston, Q. C., claimed the right to open, contending that where a verdict was taken by consent, it was the plaintiff's right to open.

Rigby, Q. C., contra.—The statute settles it. The party who takes out the rule *nisi* has the right to open. In this case the action was originally brought upon a policy of insurance, without averring that it had been renewed. The plaintiff could not recover on the original policy, because the term had expired before the loss. Subsequently the counsel for the

plaintiff got an amendment by which he alleged that the policy had been renewed. In the meantime defendants having pleaded to the original declaration, the plaintiff had replied a waiver as to several of the conditions. But when he amended his declaration by adding a count as to the renewal, defendants pleaded to the amended counts the same pleas that had been pleaded to the original declaration, and plaintiff did not reply, so that, as we contend, there is no reply of waiver to the pleas pleaded to the added counts. The importance of the pleadings and of the question as to waiver depends on this, that the company's sub-agents received a premium after the expiration of the policy, and gave their own receipt for the renewal of the policy for the year during which the fire occurred. The policy having expired, they could not, under its terms, renew it, and if they had the power to do so they did not do it according to the conditions. The condition as to renewal is that the renewal premium shall be paid before the last day of the preceding year of risk. The payment was on the 11th or 12th of January, while the risk expired on the 1st of January. Under this the actual payment of the premium would perhaps enable the plaintiff to claim a policy, but not to claim for a loss under this policy declared on.

2. There is no proof of the plaintiff's interest.

3. There is no proof of the execution of the policy by the defendant company. It is executed by Mr. Pryor, and purports to be under a power of attorney, but the power was not produced.

4. There is no proof that McKay & Hill, the professed agents, were really the agents of the defendant company. There is proof, if at all, that they were the agents of Pryor, but there is no proof that Pryor was agent of the company.

5. There was more coal oil and linseed oil than was permitted by the policy. There were two casks. The plaintiff pretends that the words are in the policy allowing three casks to be kept, but that is not in the policy, and plaintiff, after his case was done, was allowed to be re-called and give evidence that it was in the policy. We object to this as an improper reception of evidence. No notice of loss was given under section 9 of the policy.

Cites *Beadle* v. *Mutual Ins. Co.*, 2 Bennett, 501, as to the first point taken; *Tarlton* v. *Stamforth*, 5 T. R., 695; *Simpson* v. *Warre*, 2 C. B., N. S., 257, 269; *Salvin* v. *James*, 6 East., 561; *Mulry* v. *Shawmut Mutual Fire Ins. Co.*, 4 Bennett, 584.

Johnston, *Q. C.*, contra.—The defence is purely technical. The plaintiff notified McKay & Hill of his desire to renew before the end of the year, and received from them a letter stating that it had been marked renewed. That is, the money was paid by McKay & Hill for the plaintiff, or they became responsible for the money to Pryor. Where the sub-agent or agent becomes responsible to the company and looks to the insured, it is a valid renewal, and the agent looks to the plaintiff for the money. *May on Insurance*, page 136, section 134. Suppose no fire had taken place, was this policy renewed or not? (WEATHERBE, J.—The burden was on you to shew that the money was debited to McKay & Hill on the 1st of January.) The first objection to the defence of no insurable interest is that it was not taken at the trial, and the rule is confined to the points taken at the trial. (WEATHERBE, J.—Not at all.) Secondly, the plaintiff has proved that he had an insurable interest. He says he "had a house." (WEATHERBE, J.—That is all the evidence of interest. JAMES, J.—He was not cross-examined on it). The jury have passed upon it if it was raised at the trial. If not raised at the trial it cannot be raised here. (WEATHERBE, J.—Why not?) It is a general verdict, and the jury have passed on all the issues raised. The objection as to want of proof of Pryor's agency was not taken at the trial. Besides, there is the most clear and conclusive proof on that point. We have the evidence of two of the sub-agents, and the fact that he acted as agent. As to the breach of the condition as to renewals, the sub-agents charged themselves with the premiums and looked to the insured, making him their debtor. (The COURT.—That was not done on the 1st of January or before.) It must be assumed from the correspondence,—they having before the end of the year asked him to notify them if he wished the policy renewed, and having afterwards, in January, written that they had marked it renewed. In the meantime he had asked to have it renewed. Cites *Sansum*, (Ratification), 461, 910, 917; *9 Irish*

Com. Law Rep., 1; *27 Beav.*, 377; *5 DeG., M. & G.*, 265; *27 E. L. & Eq. R.*, 140; *26 E. L. & E.*, 526; *Fisher*, 6985; *3 H. & N.*, 554.

JAMES, J., now, (December 9th, 1879,) delivered the judgment of the Court:—

This is an action on a policy of insurance against fire for $2000 on plaintiff's dwelling house and shop at Cow Bay, C. B., tried at Sydney in May Term, 1878. Verdict for plaintiff by consent, subject to a rule *nisi* for a new trial on no less than ten grounds taken at the trial on motion for nonsuit, and two more in the rule *nisi*, viz.:—

1. No proof of policy.
2. No notice of loss.
3. Deficient evidence of preliminary proof.
4. Policy void by breach of condition No. 4.
5. The agent in Halifax refused to renew.
6. Policy void under condition respecting burning oil.
7. Local agent had no authority to renew.
8. No explanation of erasures in policy.
9. Improper reception of evidence with reference to burning oil.
10. Insufficient evidence of contract.

Also, after verdict, in rule *nisi*:—

11. Improper reception of evidence.
12. Verdict against law and evidence.

The defendant pleaded no less than sixteen pleas. In the 13th he sets out condition No. 6 of the policy, (hereinafter referred to,) and alleges for breach thereof that the plaintiff had not paid the renewal premium before the expiration of the policy. To these pleas the plaintiff filed several replications, three of which are to the 13th plea, setting up a waiver of the condition, to which the defendant rejoined, denying the waiver, so that the issue, as used at the trial and furnished by both parties to the Court at the argument, is sufficient to sustain the evidence of waiver given by the plaintiff. There appear, however, on the issue, several other pleas, purporting to be pleas to added counts, while there are in the declaration, as set out in the issue, no counts purporting to be added counts. It is impossible for us to discover to what these pleas refer,

The defendant's counsel contended that there had been counts added to which these pleas referred, and to which the plaintiff had not replied, and that therefore he was shut out of his plea of waiver. But we can only look at the issue upon which the cause was tried. Even had it been shewn that such added counts were on file, they were not on the issue at the trial, nor can we depart from the copies of the issue furnished us by both parties. If the issue used at the trial did not correspond with the pleadings on file, the objection should have been taken at the trial, when the necessary amendments could have been made. If we were to amend it now by adding to it the added counts or other amendments to the declaration, we would also permit the plaintiff to amend by filing a replication to the defendant's pleas to the alleged added counts, which, at the argument, he contended had, in fact, been done by him. This objection to the verdict must therefore fail.

The policy was issued on the 25th of January, 1873, and covers any loss after the 1st of January, 1873, and during that year. It is signed by H. Pryor, agent; the printed last clause of the policy representing him as the agent and attorney of the company under a special power of attorney. The printed conditions endorsed on the policy I shall refer to when I come to consider the alleged violations of them by which the policy is sought to be invalidated. But before I refer to them or to the evidence, I think it proper to remark that there is not in the evidence any foundation that I can discover for a pretence that there was any want of good faith on the part of the plaintiff, nor any negligence on his part whereby the loss was caused or the risk to the company enhanced. He had been insured in this company from a period prior to the date of the policy in 1873, but how long before does not appear. He had paid his premiums in such a way as to satisfy the sub-agents of the company, Messrs. McKay & Hill, of Sydney, and everything he did up to the date of the fire on January 17th, 1875, met with their approval. When his premises were burned at that date, he had paid his premium, which, although paid a few days after it became due, had been accepted by them, and he had every reason to believe that his property was covered by insurance; but, on making his claim he is met with a number of objections without any foundation in justice or

honor. Where there is pregnant suspicion of fraud on the part of the assured, the insurers are perhaps excusable in taking such objections, but when they are taken, as in this case, without any tittle of evidence, or even pretence of want of integrity on the part of the assured, they strike at the very existence of the practice of insurance. But the remedy cannot be supplied by this Court. The law must prevail when parties insured have, by their carelessness or want of intelligence, laid themselves open to such objections. The law neither occasions the difficulty nor can it provide the remedy. The difficulties in this and in most similar cases, now, unfortunately, becoming very frequent in our courts, are caused by the acts or laches of the assured, and the remedy is to be found in greater care on their part, and the influence of public opinion. It is not only imprudent to insure with a company known to be tricky, but it is a positive duty incumbent on every individual in the community to endeavor to caution the unwary not to patronize any such company.

The first objection urged is that there is not sufficient proof of agency in Mr. Pryor. This objection must imply that there is room to doubt whether, since 1871, Mr. Pryor has not represented himself to be the agent of the company, employing sub-agents, effecting policies and paying losses, and all the while acting without authority from the company whom he pretended to represent. The negative evidence of his agency is overwhelming,—so much so that the slightest possible positive evidence is required. This is supplied by the evidence of Hill, who says that since 1871 Mr. Pryor was the agent of the company, and Hill & McKay their sub-agents in Sydney. This the defendants might easily have contradicted, and their silence in a case of the kind must be taken most strongly against them; *27 Beavan*, 382. They might easily have contradicted this, if untrue, by Mr. Pryor, whose evidence was read in the cause, but they did not attempt to do so, doubtless for the obvious reason that it could not be contradicted. Mr. Pryor's own evidence was read at the trial, admitting not only that he acted as their agent, but as their agent he corresponded with them in relation to this claim, and sent to them the preliminary proofs. It is to be regretted that the company should have instructed their counsel to make an objection so unfair and

as are printed and issued from the corporation or their agents." In order to comprehend these objections it is necessary to review the state of facts out of which they arose. The policy is dated the 25th of January, 1873, but covers the property from the 1st of January, 1873, to the 1st of January, 1874 The premium was paid to McKay & Hill on February 17th, 1873, forty-eight days after the commencement of the risk. It was renewed by payment of premium on the 27th of January, 1874, twenty-seven days after commencement of the renewed risk. In December, 1874, a post-card was sent by McKay & Hill to plaintiff, reminding him that the policy would expire on the 1st of January, and adding; "If you wish it renewed please notify us on or before that day." The assured accordingly notified McKay & Hill that he wished it renewed, and subsequently the following letter was sent by them to him,—the exact date of sending it is uncertain, but it was sometime after the first of January :—

"SYDNEY, *January, 1875.*

"DEAR SIR,—Your policy No. 21415 *is marked renewed according to your request.* In order to prevent any difficulty in case of a loss, you had better send us the amount of premium, the payment of which is made necessary by condition No. 4, on the back of your policy."

This letter, with the exception of the date and number of policy, was printed on a postal card, shewing that it was a customary transaction in the office to mark policies renewed before payment of renewal premiums. The plaintiff accordingly remitted the premium, and on the 15th of January the agents acknowledged, by post card, its receipt with thanks. On the 17th of January, the property was consumed by fire. It will appear, therefore, that on each of the three occasions the premium was paid after the commencement of the risk; and it appears probable, but is not clear from the evidence, that the written receipts I have referred to were the only receipts given therefor. If others were given they were probably destroyed by the fire. It is contended that condition No. 4 was thus violated in two particulars,—1st, that the renewal premium was not paid before the commencement of the term, and by that condition the insurance then expired, and could not be renewed except by a new policy; and, 2ndly, that no formal printed renewal receipts were given for either of the three payments.

If the contention of the defendant's counsel was sound, that these breaches of the condition were such as the plaintiff was responsible for, and sufficient to avoid the policy, and that they were not waived by any conduct of the defendant company, then the whole insurance was void from the beginning, because the first premium was paid some time not only after the commencement of the risk, but after the issuing of the policy; and the company have been receiving the plaintiff's payments from year to year without any consideration. That in these particulars the business between the plaintiff and defendant was conducted in a manner irregular, and inconsistent with the terms of the contract is beyond dispute, and the question we have to determine is whether the plaintiff, whose good faith is not questioned, and who transacted his business with the defendant in entire accordance with the wishes of defendant's sub-agents, and, as it will hereafter appear, in accordance with their usual mode of conducting business, is responsible for these erroneous proceedings. Is he responsible to the extent of forfeiting his claim on the company, because the agents appointed by defendants to transact their business did not understand their duty, and carelessly or culpably misled him?

It appears that McKay & Hill were sub-agents, at Sydney, C. B., of the defendant company, since they went into partnership in 1871,—McKay having been the agent previously, but for what period does not appear,—and Mr. Hill at the time of the trial was still agent of the company. They must have done considerable business, as we find them remitting $2000 at one time to Mr. Pryor on account of premiums received in the month of December, 1874. Mr. Hill, called as a witness for plaintiff, says; "I don't remember having any general instructions from Mr. Pryor. There were instructions given from time to time which we observed. When we had *orders for renewals or payments of premiums*, I would send at certain intervals for renewal receipts. The practice of our office was to send to Mr. Pryor for renewal receipts, which he always sent. When I got these receipts I sent them to the parties, *whether the premiums were paid or not.* We were personally responsible to Mr. Pryor, and we charged ourselves with it as a payment." May we not infer that Mr. Pryor knew of this practice and sanctioned it, as the agent says that he acted

always in accordance with his instructions? And if Mr. Pryor did not know it, ought he not to have known it? Who is to be held responsible for his ignorance of the manner in which his business was usually and systematically conducted by his agents? But it appears that he was not ignorant of the practice of his agents inconsistent with the conditions of the policy. Mr. McKay, Mr. Hill's co-sub-agent, says; "It was very common for our office, *recognized by Mr. Pryor*, to give orders for renewals on policies which, on the face of them, had expired." In cross-examination he says; "We had no power to accept risks without the consent of Mr. Pryor, but I think it was looked on by us and Mr. Pryor that the risk would stand until notice of refusal. We believed that when we accepted the risk here, if a loss occurred before Mr. Pryor was consulted, the risk would stand. I know of such a loss being paid." And he makes the following explicit avowal; "I did know of the condition respecting payment of the renewal premiums, but it was never attended to."

It must be noted that this evidence is given by the agents of the company; that it is entirely uncontradicted, and that it is found by the verdict to be true. It follows that the verdict establishes the agency of McKay & Hill, the fact that they had power to accept risks conditionally on Pryor's approval, but valid until refused by him; that he knew and approved of the usage that the agents should receive the premiums after the commencement of the risk, they being responsible to him for the amount; and, if necessary to support the plaintiff's case, the verdict also establishes that this contract to renew the policy was known to and approved by Mr. Pryor. That these are all questions for the consideration of a jury cannot be doubted. That they all fairly arise upon and are more or less supported by the uncontradicted evidence, is, I think, apparent.

That a contract of insurance in the circumstances of this case would be affirmed in any of the Courts of the United States is beyond all question, as the United States cases are nearly or quite unanimous. We have but few of the United States reports, and I shall only refer to the digests of published cases. *Bates' Dig.*, p. 480, section 2; Payment by a cheque was held sufficient compliance with condition requiring payment before policy can take effect. P. 481, section 4;

Assured proposed payment by cheque, but the agent told him to let it lie and he, the agent, would call for it when he wanted it. The premium was not paid until after the loss. *Held* that the agent had waived the actual payment of premium, and that he had authority so to do. P. 481, sec. 5; Parol evidence of a waiver of this condition held admissible. So also p. 482, secs. 6 and 8; 483, sec. 10; 484, sec. 17; 485, secs. 19, 20, 21 and 22; 486, secs. 24, 26 and 28; 487, sec. 29. See also *Sansum's Digest*, 462, 910, 917, 919. All these cases go to show that the condition under consideration may be waived as well as any other condition by any agent having authority to receive premiums and accept risks. I need not quote authorities to show that the part of the condition requiring printed receipts may also be waived in the same way, by the same parties, and for the same reasons.

In turning to the English cases I find them not less liberal and just than the American in deciding against unconscientious objections set up by principals to avoid responsibility for the acts of their agents. In *Smith* v. *Maguire*, 3 H. & N., 554, it was held that where a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself to be acting by procuration, and that it is a question for the jury whether the defendant had allowed him to act as his general agent, and if so, the principal was liable even though he had acted without authority. *Per* POLLOCK, C. B., "I think that questions of this kind, arising on a charter party, bill of exchange, or other commercial instrument should be decided on this principle; has the party who is charged with liability under the instrument or contract authorized and permitted the agent to act in such a manner and to such an extent that from what has occurred publicly, the public in general would have a right reasonably to conclude, and persons dealing with him would naturally draw the inference that he was a general agent." In *Thompson* v. *Bell*, 26 E. L. & E. R., 536, the same doctrine was sustained. In another case, *Wing* v. *Harvey*, 27 E.L. & E. R., 140, a condition was endorsed upon a life policy that the policy should be void if the assured should go beyond the limits of Europe without the license of the Directors. The condition was infringed by the assured going to reside in Canada, where

he died. But after the breach the local agent of the Company at the place where the policy had been effected continued to receive the usual premiums upon the policy with notice of the breach of condition, which he represented as not invalidating the policy, provided the premiums were regularly paid. *Held* that the notice of the breach of the condition given to the agent of the Insurance Company was constructive notice thereof to the Company, and that the latter, whether they had express notice or not, were precluded by the conduct of their agent from insisting upon the forfeiture on the death of the assured. TURNER, L. J.—"It was said, however, that the office so received the premiums without having notice of Bennet's residence beyond the limits of Europe. * * * * I think it, however, unnecessary to determine that question. The office undoubtedly received the money from the agent to whom it had been paid upon express terms and conditions. I think, therefore, that as Lockwood & Thompson were the duly constituted agents of the office for the purpose of receiving the premiums, it was their duty, and not that of the plaintiffs, to communicate to the head office at Norwich the circumstances under which those premiums had been paid to and received by them; that the office having held out Lockwood & Thompson as their agents, to whom the public at Bury were to resort, it was incumbent on Lockwood & Thompson, and not on the parties applying to them to communicate to the office the representations annually made to them upon receipt of the premiums upon policies." This case is strongly corroborative of the doctrine held in the numerous American cases I have referred to, viz, that a waiver of a condition of the policy by the agent is binding on the company, but with this additional feature, that the company will be bound notwithstanding their want of knowledge of the breach of condition,—the principals being responsible, and not the assured, for the neglect of the agent in not giving notice to them of the breach.

In *Rossiter* v. *The Trafalgar Life Assurance Association*, 27 Beav., 377, the formal instructions to the Company's agent in Australia empowered him to grant assurances on first class lives for any amount not exceeding £2000, and prescribed particularly that the acceptance of each risk should be signified by a memo. in writing "signed by Marmaduke Constable,"

(the agent,, and by "Charles Nathan," (the medical officer); "secondly, that the memorandum to be given by Marmaduke Constable originating assurances as aforesaid shall be in the following terms, that is to say,"—giving the precise words and signatures of the memorandum to be signed. The instructions gave Constable no power, express or implied, to appoint sub-agents. Constable, however, employed Erlam & Williams as a sort of sub-agents at Sydney, and they, upon the report of the medical officer, accepted the risk, received the premium, and gave a receipt therefor, but no memorandum in the form given in the power was ever given. It was held that as an agent must necessarily perform many of his functions with the assistance of others, the acts of Erlam and Williams were binding on the Company, and that the informal receipt given by them was a substantial compliance with the instructions of the Company.

I think these cases tell with vastly increased force against the defendants if it be taken into consideration that this was not an isolated case in which the premiums were received after the commencement of the risk contrary to the words of the condition, but, on the contrary, that it was so far the usual practice of the office in their business at Sydney that a majority of the risks accepted were subject to that irregularity. If, in *Wing* v. *Harvey*, the Company were affected by the neglect of their agent to give them notice in a single case of irregularity, still more must the Company be bound to know the mode in which their business is usually and habitually conducted by their agents. If this be not so the greater part of the considerable business they have done at Sydney has been void, and large sums of money have been paid to them month after month for a number of years without any consideration, and which can be recovered back from them by the numerous parties who have held their policies without being insured.

There are one or two minor objections taken at the argument to which I have not referred, but which are either not sustained by the evidence, or were not taken either at the trial or in the rule *nisi* to set aside the verdict. I think the verdict should be sustained and judgment entered for the plaintiff.

DesBarres and Smith, JJ., concurred.

Weatherbe, J., *dubitante*.

PAGE *v.* CHAMBERS.*

PLAINTIFF, in his bill or writ, set out that John Blair granted certain lands to defendant by deed, which, though absolute in its terms, was given to secure $600 advanced by defendant to creditors of said grantor, and that defendant, at the execution of the deed, promised to reconvey to the grantor on payment within three years of the amount due; that the estate of the grantor had become vested in plaintiff, who had tendered the $600 and offered to pay any balance found to be due defendant, who refused to accept the money or execute a deed. Defendant's answer set up a parol trust to pay in full a debt due by the grantor to defendant and apply the surplus ratably among five other creditors; that the amount thus due was more than the $600 tendered, and defendant offered to reconvey the land on payment of the debts as security for which it was given. A memorandum signed by the grantor was delivered to the defendant at the time of the conveyance, witnessing that "the sums attached to the following names," (the five creditors referred to by defendant in his answer,) "are included as the consideration money of John Blair to Robert Chambers." The creditors referred to were at the time pressing Blair for payment, and gave him time in consideration of this conveyance. The claims of several of them were bought at a reduced rate by Blair's son-in-law in Blair's interest.

Held, that there was a consideration moving from the several creditors named in the memorandum to Blair, and a resulting trust in favor of all the said creditors; that parol evidence of this trust could be given consistently with the Statute of Frauds; and that defendant held the land in trust for the payment of his own debt and the debts of the other creditors at their full amount, notwithstanding the purchase of the same for a reduced sum, which was held to be a matter solely between those creditors and their assignee.*

THIS was an appeal from the decision of JAMES, J., sitting as Equity Judge, His Honor the Judge in Equity being disqualified on account of having been consulted in the cause previous to his appointment. Numerous grounds of appeal were taken, and the cause came on for hearing before SIR WILLIAM YOUNG, C. J., MCDONALD, SMITH and JAMES, JJ. but after briefly arguing the principal grounds of appeal *Rigby, Q. C.*, on the suggestion of the Court per YOUNG, C. J consented to the appeal being dismissed with costs, *Graham* for respondent having previously offered to forego the costs of appeal.

The following is the decision of JAMES, J., appealed from:—

This is an Equity cause, commenced August 19th, 1870. It comes before me as one of the Judges of the Supreme Court for adjudication, under section 6 of chapter 25 of the R. S., the hon. the Judge in Equity being disqualified by having been professionally consulted in the cause while at the Bar.

The bill sets out that John Blair the fourth, on 20th March, 1863, conveyed to the defendant and his heirs, certain

*THIS is in the first instance the decision solely of JAMES, J., but as the appellant, on the suggestion of the Court, consented to his appeal being dismissed with costs, it may be fairly considered as equivalent to a decision of the Court.

lands in the township of Truro, in consideration of $600; that the deed, (which declares no trust, but purports to be an absolute conveyance in fee simple), was given to the defendant as security for the sum of $600 due to, and advanced by, the said defendant to creditors of the said grantor; that the defendant at the execution of the deed promised the grantor to re-convey, on payment within three years of the amount due, and that the lands had not been conveyed, but were still held by the defendant; that the estate of the grantor had become vested in the plaintiff, subject to payment to defendant of the amount due him; that plaintiff had exhibited to defendant his deed and tendered him $600, and offered to pay him any balance due on account taken, and also tendered to him a deed for execution; that defendant refused to accept the money or execute the deed. This sum of $600 was afterwards paid into Court by plaintiff.

The declaration also alleges that the grantor was indebted at the time of the grant to plaintiff, and that the deed was made to defendant to defraud the plaintiff of his debt; that plaintiff had no other means of recovering his debt except out of those lands, and that the deed was executed by grantor and accepted by defendant in fraud of plaintiff's rights; and prayed that the deed might be declared null and void, and that the defendant should be decreed to execute a deed to the plaintiff of the lands, on payment to him of the amount found to be due the defendant on account, and to pay the costs.

The answer admitted the conveyance and set up a parol trust to pay in full a debt due by grantor to the defendant, and to apply the surplus ratably among five other creditors of the grantor; that none of the debts having been paid by grantor, the defendant, at the end of the three years, would have sold the land in order to fulfil the trust pursuant to the agreement with the creditors, but that he did not do so because he was requested by the creditors to delay the sale, as an adequate price could not at that time be obtained; that the amount due defendant and the five other creditors was more than the $600 tendered; and he offered to account, and to convey the land on payment of the amount of the debts as security for which the deed was given. The answer denies fraud.

The plaintiff derived title as assignee of a judgment against Blair recorded subsequently to the deed to defendant, and under a sheriff's deed founded on an execution issued on such judgment. The plaintiff's position and right to redeem are not in controversy in this cause. On 25th January, 1872, the whole of the material facts in the cause, excepting that of fraud, which is not mentioned in the order, were by rule of Court in Equity, on motion of plaintiff's counsel, referred to Mr. Munro, a master of the Court, who took the evidence of the parties and several of the creditors as to the nature and terms of the trust, and the amount due to the defendant and the creditors in the following memo., which was prepared, signed and delivered to defendant at the time of the conveyance to him:

TRURO, *March 20th, 1863.*

This memorandum witnesses that the sums attached to the following names are included as the consideration money of John Blair 4th to Robert Chambers, dated March 20, 1863.

ROBERT CHAMBERS—CLAIM IN FULL.

Hugh Dickson,	Note.	January 5, 1863....	£25	17	0
William Blair,	Note.	Decem'r 1, 1859....	12	0	0
Doctor Bent,	Note.	March 20, 1863....	20	0	0
William Carlisle,	Note.	May 12, 1855	24	0	0
	Note.	June 10, 1855			
Lemuel Lyons,	Note and int. to date....		14	11	3

The evidence taken before the Master, which is the only evidence taken in the case, was reported by him to the Court, and it fully confirms the defendant's contention in his answer as to the terms of the trust, and the Master reports on that point to the same effect.

Whether the parol evidence of the trust was admissible to establish and define it, I shall consider hereafter in relation to the plaintiff's first objection, that there was no trust except for defendant's own debt as a mortgage.

The Master also reported that Thomas McKay had purchased at a reduction in amount for the benefit of the grantor, who was his father-in-law, the debts of four of the five creditors named in the memorandum, viz,: Hugh Dickson, William Blair, William Carlisle and Charles Bent, and taken an assign-

ment in his own name of these debts, leaving the debt of Lemuel Lyons in the same position that it was in when the deed to defendant was made. I shall consider the effect of this transfer when I decide upon the plaintiff's second and third contention, that the assignment was fraudulent and that no trust for these debts in any case existed, except for the reduced amounts paid by McKay.

The Master did not prepare an account, but he reported the items which formed the materials of the account. Immediately after Mr. Munro's report was filed, viz., on 4th March, 1872, the plaintiff's attorney made out an account from the materials contained in the report, and obtained a rule *nisi* from the late Judge in Equity to confirm the report, and that the defendant should convey to plaintiff on payment of the balance shown by such report and account, but the rule *nisi* was not adjudicated on by him, owing probably to his illness and absence from the province, and his subsequent decease. No further progress was made in the cause until March, 1874, when, the present Judge in Equity being disqualified to proceed with it, the cause appears to have been brought, by consent, to a hearing before the late Judge McCully, as I find among the papers an *interim* decree or order from him of that date, ordering that the lands in question be sold as in case of foreclosure by the Sheriff of Colchester, and the amount of sale paid to the accountant and treasurer of the Court. Under this order the lands were sold by the Sheriff and purchased by the plaintiff for the sum of $1300, and the net proceeds paid to the accountant and treasurer of the Court, in whose custody they still remain.

The order also directed that the evidence taken and the accounts produced by the several parties, and the memorandum accompanying the grantor's deed to defendant, and the assignment to McKay be referred to a Master to report the amount due to the several parties at the date of the report. Subsequently, after a further repose of three years and two months in the cause, B. G. Gray, Esquire, one of the Masters to whom the accounts were referred, reported fully on the matters referred to him. His report is dated 1st May, 1877. A rule *nisi* to confirm his report was on 26th February last applied for by Mr. Eaton, of counsel for Lemuel Lyons, one of the

creditors, and granted by Judge McDonald, and this rule *nisi* came before me for discussion on Thursday, 4th April, 1878, several months more having elapsed since the passing of the rule *nisi*. Mr. McDonald, Q. C., appeared for plaintiffs, Mr. Graham for defendant, and Mr. Eaton for Lemuel Lyons. The other four creditors mentioned in the memorandum, and Mr. McKay, to whom they assigned, were unrepresented.

As there had been no exception taken to the report of Mr. Gray, and as both parties admitted its accuracy as an account, I granted a rule absolute to confirm the report of that date. It was also agreed by counsel present that inasmuch as the order of Judge McCully settled no point in the case, I should proceed forthwith to the final hearing and adjudicate upon the whole cause; and the counsel mentioned having explained the general features of the cause, I adjourned the hearing to the 10th day of April, when the same counsel appeared and stated their respective contentions as follows:—

The plaintiff contended, first, "that in view of the Statute of Frauds, the defendant, who was admitted to be mortgagee to the amount of his own debt and of two prior incumbrances, which he had taken up to protect the title, was not legally trustee for the five creditors mentioned in the memorandum, and that parol evidence to establish a trust for their benefit was improperly received;" secondly, "that if there was a trust for these five creditors it would not, in relation to four of them, be for more than the reduced amount paid by McKay;" thirdly, "that the assignment to McKay is fraudulent, as it recites that the debts of these creditors were paid by him, while, as it appears by the evidence, they were only paid in part." The plaintiff's counsel also claimed costs of the cause.

The defendant's counsel claimed that the defendant was entitled to costs, inasmuch as plaintiff had persisted in two unsound contentions vitally affecting the case; first, that the deed to defendant was fraudulent, and secondly, that there was no trust for the five creditors signing the memorandum; and, also, on the ground that if a mortgagee comes in to redeem after forfeiture of condition he must pay costs, and that the defendant had offered to assign on payment of his claim, but plaintiff had not tendered a sufficient amount; also that plain-

tiff should pay costs of Lemuel Lyons. Mr. Eaton, for L. Lyons, claimed the amount of his debt, interest and costs.

On looking at the papers, I found that any decision to which I might arrive would not be binding in the present state of the cause upon Lemuel Lyons one of the protected creditors, nor upon Thomas McKay, who represents by assignment the other four protected creditors, they not being parties to the suit, and that Mr. Lyons' attorney, who had been for some time taking an active part in forwarding the cause, had no legal status in the cause. I therefore, on motion of Mr. Eaton, granted an order *nisi* to amend the writ by making these parties defendants on suitable terms, which order was subsequently made absolute without opposition and placed on file.

There are collateral matters in evidence, chiefly affecting the account, to which I need not advert. What of the evidence I have briefly summarized is sufficient for the purpose of deciding the questions of law affecting the rights of the parties which I have already stated as presented to me by counsel.

The evidence is clear and conclusive that the terms of the conveyance to defendant were that he should sell the property to the best advantage, pay his own debt in full out of the proceeds, and apply the surplus in payment of the other debts named in the written memorandum. He incurred no liability to pay these creditors, and made no advances to them on account of their debts; but the protection of these creditors unquestionably formed a part of the consideration moving Blair to made the deed, and the defendant, beyond any doubt, undertook verbally to dispose of the property for their benefit as well as his own, should he be able to realize out of the property more than sufficient to pay his own debt; and he took into his possession along with the deeds the written memorandum signed by the creditors to that effect, but without himself signing it. On the faith of this transaction these creditors doubtless postponed seeking to recover their debts, and the defendant never in any way disputed but expressly admits and asserts his liability to fulfil this verbal contract up to the present time, and acted upon it by holding the property in the interests of the creditors when he might have sold it for sufficient to pay his own debt. The question is,

was the evidence, so material in the moral aspect of the case, properly admitted in accordance with the principles of equity as administered by a court of chancery?

To the extent of the defendant's own debt, the rule as to the admissibility of parol evidence is indisputably in favor of the mortgagor as against the mortgagee claiming the conveyance as absolute. The rule to this effect is stated, and the cases cited in *1 Hilliard on Real Estate*, p. 547; but this is a different case. Here are three parties who make a contract together for their mutual benefit. Blair got time from his creditors and these creditors, including the defendant, got, or contracted to get, security for their debts on condition of waiting three years. It is true that there were also debts due to the plaintiff and others which were not provided for in the trust, but that did not constitute a fraud on the part of Blair or the defendant. There is no evidence in the papers of this charge being formally withdrawn by plaintiff, but it was not contended for by plaintiff's counsel at the hearing before me. The transaction was entered into and we must hold in good faith, and it must be sustained on the evidence, unless the evidence disclosing it is inadmissible under the Statute of Frauds.

The statute enacts that "no declaration of trust in lands * * shall be valid unless it shall be in writing signed by the party entitled to declare the trust, or by his last will," and excepts "trusts arising by implication or construction of law." The latter class of trusts, *i. e.*, "resulting trusts," are, by Lord HARDWICKE in *Lloyd* v. *Spillet*, 2 Atk., 148, divided into three classes, one of which is where an estate is purchased in the name of one person, but the money or consideration is given by another, and a trust in the estate results to him who gave the consideration.

It is true in this case the conveyance was not founded on a purchase nor upon the actual payment in money of a consideration, as in most of the cases cited, but was founded upon a consideration proceeding from the five creditors as well as from Chambers; and that consideration was that they should accept the conveyance as their security and give three years time for the sale of the property and payment of their debts. At this time they were pressing Blair for their debts

and gave him time on account of the conveyance, and have refrained from collecting them up to the present time, when they are barred by the statute of limitations. There was, therefore, a consideration moving from them to Blair, and the arrangement was made that they should be interested in the conveyance in certain specified proportions, thus complying with the rule laid down in the American cases, cited in *Brown on Frauds*, p. 83. I consider that this is a resulting trust under the statute, and that therefore, parol evidence of it was admissible consistently with the statute just as much as if the parties, *i. e.*, Chambers and the other five creditors, had purchased the land from Blair absolutely for the amount of of their respective debts. It is true that there is an American decision cited in notes to *Hill on Trustees*, 4 Am. ed., p. 95, from 36 Maine Reps., that a resulting trust arises when the consideration of the deed is an old debt which the land is held to secure.

Then, although it is true that the party to declare a trust is usually in practice the party to whom a conveyance absolute in form is made, yet it is settled law that the language of the statute will be satisfied by the signature of the grantor himself if the declaration be previous to, or contemporaneous with the act of disposition; see *Adlington* v. *Cann*, 3 Atk., 141. But if he has once divested himself of title by an absolute conveyance it is no longer competent for him, either by a subsequent parol or written declaration, to convert a party, taking under such a conveyance, into a trustee; *Hill on Trustees*, 62; *Brown on Frauds*, 103. In the present case a trust was declared by the grantor contemporaneously with the deed and signed by him, referring in express terms to the deed, and specifying with sufficient accuracy the relations of the several parties to the trust. This paper was delivered by the grantor, with the deed, to the grantee, and accepted and held by him as a delaration of the trust on which he accepted the deed, on which he acted through the transaction, which he affirms in his answer to the cause, and which it is his sole purpose and aim in his defence to sustain. Indeed Chambers is but a nominal defendant. The suit is really defended for the benefit of the other five creditors, whose interests alone are impugned by the plaintiff in his contention before me; *Hill on Trustees*,

108, citing from *Dyer* v. *Dyer*, 2 Cox, 93. The title of a volunteer is never favored in a Court of Equity, and therefore the courts have brought in evidence in numerous cases and on very various grounds to prevent the statute, which was expressly intended to prevent frauds, from operating as a protection to fraudulent transactions. So much is this the case that it may almost be said that whenever the operation of the statute would work a fraud, as it certainly would in this case, the Court will admit evidence to shew the real intent of the parties in making the deed and over-rule the plea. *Battington* v. *Fletcher*, 2 Atk., 155. And in another case it is laid down that when parol evidence is given by a grantee with a view to disproving the plaintiff's case, the Court, on the general rules of evidence, permitted the plaintiff in his turn to have recourse to similar proofs for the purpose of rebutting the evidence. *Dyer* v. *Dyer*, 2 Cox, 93. See also *Lake* v. *Lake*, Ambl., 127. These are but two of a number of cases to a similar effect. *Hill*, (page 107,) lays it down that proper evidence will be admitted in all these cases to establish a trust against the volunteers by showing that it was the intention of the parties at the time he should take as a trustee for the grantor, and not for his own benefit.

Now what are the facts of this case admitted by plaintiff himself? In his bill he states that the said deed was given by said grantor to said defendant as security for the sum of $600, due to and advanced by the said defendant to creditors of said grantor; and further, that at the time the said deed was executed the said defendant promised and agreed to and with the said grantor that he would reconvey to him the said lands upon payment to him, within three years, of the amount due thereon.

The plaintiff, therefore, expressly admits that this was a trust deed, and sets out what he considers the trust to have been. The allegations must be answered by the defendant, and his answer, when sworn, is, in equity, evidence in the cause. The plaintiff, therefore, expressly requires the defendant to give evidence as to the accuracy of his allegations of the nature of the trust. He puts it in issue as a part of his case, and challenges the defendant to contradict it by evidence, and the evidence then given before the Master was not even objected

to. Here then is a resulting trust set out in the plaintiff's bill, and the only question is, whether he has set out the trust accurately. The defendant denies this, and sets out in his answer a different version of the trust, sustained by a written paper prepared by the grantor and handed to the defendant along with the deed, stating the nature of the trust accurately and fully. It seems to me to be a question, not as to whether there was a resulting trust, but as to what that trust was. The plaintiff cannot accept one part of the trust and ignore the rest. Surely it is not necessary for me to pursue this part of the subject further. I have no doubt that the defendant has established his defence as set out in the answer upon the main question in contention in the cause. With respect to the plaintiff's second contention that the defendant, if trustee for these creditors, can only receive out of the fund sufficient to pay the debts of the four creditors who assigned to McKay at the reduced rate paid by him to them, I can see no ground for this position. The rights of the creditors under this trust were assignable or not. If not, the trust still exists for their benefit to the full amount of their claims, and if they were assignable, McKay had a right to purchase them at any price he could negotiate. It is a matter between McKay and the four creditors which does not in any way affect the plaintiff's interests.

The fact of the assignment stating as its consideration that the debts were paid in full is quite immaterial. I can see no more indication of fraud in this than in the case of a debtor compromising with his creditors and taking a receipt in full for the debts. As the plaintiff's counsel did not indicate who was or could have been defrauded, I must dismiss this contention as wholly unfounded, and hold that McKay, under his assignment, is entitled to all the rights in this trust of the parties who assigned to him. Several of them have been examined as witnesses and expressed no dissatisfaction.

The defendant's counsel claims costs against plaintiff on these grounds:—

1. Because the plaintiff has throughout the cause maintained two invalid contentions, vitally affecting the cause, viz., that the deed to defendant was fraudulent, and that the trust

protected only the defendant's debt and not those of the creditors; and to these may be added the contention that McKay was only entitled under the trust to the reduced amount.

2. Because the plaintiff before action did not tender a sufficient amount; and

3. Because a mortgagor, (or his assignee,) coming in after condition forfeited, must pay costs.

I need not decide as to the second and third of these objections. With respect to the first, I have to remark in the first place that, although in case of positive misconduct on the part of the mortgagee, he may not only be deprived of costs, but ordered to pay them, yet in all ordinary cases the rule is clear and well established, that the mortgagor, (or his assignee,) seeking to redeem, must pay costs even when the mortgagee questions unsuccessfully, but on a reasonable doubt, his right to redeem, or extends his claim beyond what the Court finally decides he is entitled to. The cases are summarized in *Perkins, Dan. C. P.*, 1393, Am. ed. The rule, therefore, independently of any misconduct on his part, is against the plaintiff, and it is not necessary for the defendant to show that the plaintiff has made unreasonable contentions in order to subject him to costs unless the defendant himself has been guilty of misconduct; I can see no misconduct on the part of the defendant, either before or since the commencement of the cause, and none such has been suggested to me. He has made no unreasonable demands and made no unreasonable or invalid contentions. On the contrary, I have found it, as I believe, my duty to sustain his conduct and contentions on all points. I do not say that the contentions of the plaintiff, which I have decided against him, are entirely unreasonable; on the contrary, I have not arrived at my conclusions on the main points without research and consideration, but if the plaintiff assumed untenable positions, he surely did so at his own risk. I have no doubt, therefore, that the general rule, that the party seeking to redeem must pay the costs of suit, must prevail, and I have the less regret in coming to this conclusion on account of his having assumed untenable positions in the investigation and discussion of which by far the greater part of the costs in the cause have been incurred. I give costs against the

plaintiff to Lemuel Lyons, from the date of his appearance, as fixed by rule of court.

I direct that it be referred again to Mr. Gray to complete the account to the 15th day of September, 1878, and desire that Mr. Gray's attention be called to an apparent error in the Sheriff's charge, as contained in his report of the sale. He will allow what the Sheriff is legally entitled to charge. Mr. Gray will also scrutinize any other similar matters appearing in the accounts, so that I can give an order for a specific sum as due on 15th September.

DEWOLF *v.* NEILLY.

JUDGMENT for plaintiff sustained where defendant pleaded a discharge in insolvency, and it appeared that the note sued on, of which the present plaintiff was the endorsee, had been included in the amount scheduled as the claim of the original payee, but no particulars of it were given, as provided by section 61 of the Insolvent Act of 1875. The plaintiff's name appeared in the schedule, but no amount was set opposite.

THIS was an appeal from the County Court, at Halifax. The action was brought on a promissory note for $400, being the limit of the jurisdiction of the Court, and judgment was given for plaintiff. The note was given by defendant to Miner T. Foster, who endorsed to plaintiff. The defendant pleaded a discharge in insolvency, to which it was objected that the plaintiff's name did not appear on the defendant's schedule. The chief points were whether there should not have been a replication to this effect, and whether the schedule was defective. Another ground was taken on motion for nonsuit that the Court had no jurisdiction, because the plaintiff might have made a claim for interest in addition to the amount claimed, which would have placed the amount beyond the jurisdiction of the Court.

Eaton, for appellant.—The name of plaintiff, who did business under the style of T. A. S. DeWolf & Son, appeared in the schedule as T. A. DeWolf & Son, but no amount was set opposite to it. There is evidence that the note was included in Foster's claim, and that he was paid a dividend on it. DeWolf was not known in connection with the note, and his name

appeared on the schedule in connection with another claim. I say that, being there, it was available for all purposes, and the assignee had to give him notice. There should have been a replication here setting up the alleged defect in the schedule. (WEATHERBE,J.—Can we not send the matter back to have the want of a replication supplied, if that is all that is required to make the judgment good?) When a cause comes up here it should be taken as it is found. (WEATHERBE, J.—We have already sent a case back, ordering judgment to be given for the other party, and we are considering whether we shall not do it in other cases. The plea of the deed of discharge is not enough if this debt was not included in it.) The practice is to plead the discharge and for the other party to reply that the name was not included in the schedule. I have examined the Canadian cases. I am not to plead that everything in connection with the discharge was rightly done. That is all decided by the Judge who grants it. (WEATHERBE, J.—The discharge is not from all liabilities, and if a Judge grants such a discharge it is illegal. You must shew that this debt is brought within the statute. MCDONALD J.—You are seeking to give the statute a wider signification than it will bear. You must shew yourself that the debt is within the statute.) I have been able to find no such plea. (JAMES, J.—Our statute is different from the English statute.) *Farrell* v. *O'Neill*, 22 U. C., C. P., 31. In L. T., vol. 40, p. 150, *Elmsley* v. *Cerry*, the party's name was omitted altogether. When DeWolf's name is put on the schedule that is the matter of prime importance. He then gets a notice and may file his claim. If one of the elements of the schedule is wanting must it be thrown out?

MCDONALD, J.—You have pleaded a discharge which does not exist, a discharge from obligations generally.

YOUNG, C. J.—You admit that the name was not on the list as regarded this claim.

Eaton.—I don't think it makes any difference.

WEATHERBE, J.—I don't see how the defendant, knowing the condition of his deed, went into Court at all.

Eaton.—I think when a party comes into Court he should have notice of what the issue is to be.

McDONALD, J.—You think the other side should plead what should have appeared in your own plea.

Eaton.—I admit that the discharge could only apply to the schedule, but I contend DeWolf was in it.

McDONALD, J.—It should appear in the pleadings. The English case is under the Bankruptcy Act of 1869.

YOUNG, C. J.—The Act differs in many respects from ours, and among others in this. We will have to dismiss the appeal.

Appeal dismissed.

SMITH *v.* McDONALD.

THE Judge having refused a nonsuit, plaintiff consented to become nonsuit on condition that the Judge would grant leave to set it aside, to which the Judge agreed, reserving the question whether he had legal power to do so.

Held, that the plaintiff having consented to the nonsuit, could not afterwards move to set it aside.

THIS was an action for obstructing a right of way. Henry, at the trial, moved for a nonsuit, on the grounds that no title was proved, nor such user as would sustain an easement, and that there was no proof of a right of way. The Judge having refused a nonsuit, the plaintiff consented to become nonsuit on condition that the Judge would grant leave to move to set the nonsuit aside, to which the Judge agreed, reserving the question whether he had legal power to do so, plaintiff taking the risk.

Henry took a preliminary objection that the plaintiff, having consented to become nonsuit, could not now move to set it aside. *Roscoe's N. P.*, 296, 297; *L. R.*, *9 Q. B.*, 122; *3 M. & G.*, 452.

Weeks, contra, said he thought the objection would have to prevail.

Rule dismissed.

BLISS *v.* DICKIE.

PLAINTIFF, a Registrar of Probate, was requested by the defendant, a Proctor practising in the Court, to prepare copies of certain papers. Before the papers were completed plaintiff ceased to be Registrar, but was not aware of his removal from office when the order for the papers was given. The work was charged, not to the defendant, but to the estate for which he was acting. The Magistrates' Court and the County Court, on appeal, decided in favor of plaintiff.

Held, that the defendant was liable for the fees.

THIS was an action brought in the Magistrates' Court to recover fees alleged to be due to the plaintiff for copies of papers made by him as Registrar of Probate, upon the request of the defendant, a Proctor, practising in the Probate Court. The defence was that the papers were of no use to the defendant, as the plaintiff had ceased to be Registrar of Probate before they were complete, though it was admitted that plaintiff was not aware of his removal from office when the order for the papers was given. The work was charged, not to the defendant, but to the estate for which he was acting. Judgment was given for the plaintiff in the Magistrates' Court, which was confirmed on appeal to the County Court. Defendant then appealed to this Court, and the learned Judge of the County Court, in granting the appeal, did so subject to the question whether he had power to grant an appeal to the Supreme Court in a matter originating in the Magistrates' Court. The cause was argued before SIR WILLIAM YOUNG, C. J., RITCHIE, E. J., SMITH and WEATHERBE, J J.

Ritchie, J., for plaintiff, took the preliminary objection that no appeal could be allowed, citing *Coolan* v. *McLean*, and *Cochran* v. *Larcom*, 3 R. & C., 479. 480.

Rigby, Q. C., contra, contended that under the statute of 1879, appeals were allowable in the discretion of the Judge in all causes.

Ritchie, J.—It is left to this Court under the rule to say whether there shall be an appeal. The question to be decided is not a very intricate one. It is simply whether a Proctor is liable to a Registrar of Probate to pay for papers ordered. The Registrar had been appointed during pleasure, and was superseded by another, but had prepared these papers before being notified of the cancellation of his appointment.

Tupper, contra.—The work is not charged to the defendant but to the estate for which it was done. The papers were no good, the appointment having been cancelled before the work was completed.

RITCHIE, E. J.—Must not his dismissal be made known to him?

Tupper.—His existence as an officer ceases when it is announced in the *Gazette.*

RITCHIE, E. J.—The attorney who orders papers is liable for them.

Tupper.—It is admitted that the work was not charged to the attorney, but to the estate for which it was done, and to which credit was given.

WEATHERBE, J.—He employed the officer while he was officer to do certain work, which was done, and the Judge has allowed for it. You cannot argue on that point.

Tupper.—The papers were worthless, as the appointment had been revoked. We could not be compelled to pay for papers which were of no use to us. The papers were prepared anew by his successor.

WEATHERBE, J.—There was no necessity for that. They should have been signed by the new officer.

RITCHIE, E. J.—In any case where an attorney orders papers he is liable unless he expressly states that he is not to be charged.

Tupper.—My point is that the very fact of the fees being charged to the estate, and the estate being called on to pay, shews that there was no contract with the Attorney.

YOUNG, C. J.—We are all of opinion that the appeal must be dismissed, and the judgment below sustained with costs, without deciding the point whether the order for appeal is good.

HEUSTIS *v.* LYNDS.

A RULE for appeal from the County Court was taken in the following form; "On hearing read, &c., it is ordered that the defendant have leave to appeal, and an appeal is hereby granted from the judgment, &c., upon the following grounds * * unless cause to the contrary be shewn before the Supreme Court *in banco* during the first four days, &c."

Appeal dismissed.

Johnston v. *Poyntz*, (*ante* p. 166) distinguished.

THE defendant was convicted before two Justices of the Peace of a violation of the statute relating to intoxicating liquors, and was fined $80. An appeal was taken from the conviction to the County Court, and on the first day of the sittings of the Court a motion was made to quash the appeal on the ground that the bond on appeal was not for double the amount of the conviction and costs. Judgment was given by the learned Judge of the County Court, (BLANCHARD, J.,) quashing the appeal on this ground, and a rule for appeal from this judgment was granted in the following form:—

IN THE COUNTY COURT, 1879.

COLCHESTER, SS.

Cause—Edward Heustis, Clerk of License, Plaintiff.

v.

Michael Lynds, Defendant.

On hearing read the affidavit of F. A. Laurence, the Attorney of defendant herein, the conviction and appeal bond, and other papers on file herein, and, on motion, it is ordered that the defendant have leave to appeal, and an appeal is hereby granted from the judgment or order of this honorable Court, given at the August Term, A. D. 1879, of this honorable Court at Truro, quashing the appeal in this cause, because the appeal bond in this cause is for an amount less than double the amount of the conviction therein, to the Supreme Court *in banco* at Halifax, upon the following grounds:

1. Because the said conviction is for the sum of eighty dollars only, and the said bond is for double the said amount.

2. Because the learned Judge was wrong in holding that he could go outside the said conviction to ascertain the amount.

3. Because the said conviction was not ambiguous or uncertain, and was for an amount less than one-half the amount of said bond.

4. Because the order or judgment of the learned Judge of his Court, quashing said appeal, was against law.

5. Because the appeal papers herein were regular and perfect.

And on the grounds disclosed in such affidavit and the papers in this cause, unless cause to the contrary be shewn before the Supreme Court *in banco* at Halifax during the first four days of the next ensuing December Term thereof; and that the defendant or appellant herein do enter this cause for argument on the first entry day of said Supreme Court hereafter, and that all proceedings on the part of the plaintiff be stayed.

Dated at Truro, this 6th day of September, A. D. 1879.

By the Court,

(Sgd,) GEORGE READING,
Clerk.

On motion of Mr. Laurence, for defendant.

The appeal came on for argument January 9th, 1880, before SIR W. YOUNG, C. J., RITCHIE, E. J., SMITH and WEATHERBE, J J.

Graham, for appellant.—This was a conviction under the License Act. The bond for the appeal was only $170, less than double the amount of the conviction, including the costs. The Judge was moved on this ground to quash the appeal, and in answering that motion it was shewn that the conviction itself was wrong, as the defendant was fined $80 without any proof having been given of previous offences.

RITCHIE, E. J.—The Judge has left it to this Court to say whether there is an appeal or not. Can that be done?

Graham.—The case of *Johnstone* v. *Poyntz*, (*ante* p. 166,) is similar to this. There the objection to the form of appeal was overruled.

RITCHIE, E. J.—The rule in that case is different from the present. If we allow an appeal under this rule we permit the County Courts to require this Court to grant or refuse their appeals. This rule says, in terms, that the appeal *is* granted, but, in effect, it is that it *shall* be granted if this Court sees fit. No doubt the Judge intended to grant the appeal.

Meagher, contra.—There are other objections. The Judge's judgment is not here.

Graham.—There was only an oral judgment.

Appeal dismissed.

FRASER & BELL *v.* TOWN OF NEW GLASGOW.

THE act incorporating the Town of New Glasgow empowered the corporation to vote, assess, collect, receive, appropriate and pay the moneys required for poor rates and all other rates, and conferred upon the corporation all the powers theretofore vested in the Sessions, Grand Jury and Town Meeting, with power to make by-laws substituting assessment in lieu of statute labor, and to make all rules necessary for the creating and conduct of the Police and Municipal Court of the town, and for regulating the mode of assessment and levying the same, and generally for all purposes connected with or affecting the internal management or government of the town.

Held, that the corporation could not, under these provisions, establish a Court of Appeal and Revision, with reference to assessments, with power to administer oaths.

Under a by-law of the Town of New Glasgow, providing that all real and personal property in the town should be liable to taxation,

Held, that insurance and bank stocks owned by residents of the town, in companies not doing business in the town, were not liable to assessment.

Where the Assessment Roll was amended by the Court of Revision, a committee chosen from the Council, pursuant to a by-law, for the purpose of reviewing the assessment, and the action of the Court of Revision was confirmed by the Council,

Held, that a writ of *certiorari*, addressed to the Court of Revision and the Town Clerk, could be sustained, though otherwise if it had been addressed only to the Court of Revision.

THIS matter came before the Court on a writ of *certiorari* directed to the Town Clerk of New Glasgow and the Court of Appeal and Revision held under the by-laws of the town in reference to assessments. By the by-laws relating to assessment it was provided that all real and personal property in the town should be liable to assessment, and the Court of Appeal and Revision amended the Assessment Roll by adding to the property for which Mr. Fraser and the Messrs. Bell were originally assessed certain insurance and bank stocks in banks and companies, in Halifax and Pictou, not doing business in New Glasgow. The validity of the assessment was attacked chiefly on this ground, but the authority of the Court of Revision and the regularity of its proceedings were also questioned on the grounds appearing in the rules to quash the assessment, one of which was as follows:—

In the matter of the assessment of James Fraser, passed by the Court of Appeal and Revision for the Town of New Glasgow, in March, 1878, on the complaint of Jeffrey McColl, Appellant.

Upon hearing read the writ of *certiorari*, sued out of this Court the 26th day of April, 1878, by the said James Fraser, directed to said Court of Repeal and Revision in reference to said assessment, and the return thereto, and the exhibits, papers and books annexed, the affidavit of said James Fraser, and

exhibits annexed and refered to therein, and the papers on file, and on motion it is ordered that the resolution, order or decision of the said Court of Appeal and Revision, and all proceedings taken before said Court in reference to the assessment of said James Fraser, and the said Assessment Roll so far as it relates to him, be quashed and set aside with costs upon the following grounds:

1. The said James Fraser was not liable to be assessed for any property except in the Town of New Glasgow, and said Court had no jurisdiction in relation to property without the said town or the assessment thereof, or to add the same to other property of said James Fraser to be assessed.

2. The shares in the Bank of Nova Scotia, the Union Bank of Halifax, and the Bank of British North America were not property and could not be assessed.

3. They could not be assessed on account of said banks being banks at Halifax, as detailed in said affidavit.

4. The shares in the Bank of Nova Scotia could not be assessed, on account of the exemption of the owner of stock in an incorporated company, the property of which is assessed in New Glasgow.

5. The said shares in the Home Marine Insurance Company are not property; they could not be valued or assessed; they could not be assessed in New Glasgow, where the said company has no existence, and they exist only in Pictou.

6. The said Court had no legal existence, was not contemplated in the statute; the by-laws creating it were *ultra vires*; it had no jurisdiction over the subject-matters upon which it professed to adjudicate, and could acquire none over the said James Fraser or his property.

7. The proceedings were irregular, and it had no jurisdiction in consequence of sitting after the first day of March of that year, under the by-laws.

8. That there was not sufficient proof of preliminary notice, and of the appeal, posting up the list of complainants, and foundation for proceedings to give the Court jurisdiction over the person and property in the absence of said Fraser, and it proceeded irregularly and without jurisdiction.

9. There was no notice to said James Fraser of said proceedings containing the grounds of objection and the subject

matter of the appeal, and no legal evidence was taken, and no evidence of any kind was adduced, nor were the assessors heard, to enable the Court to deal with the said assessment, or to come to any decision thereon.

10. The said Court had no power or jurisdiction to make an order, decision or resolution that said shares should be assessed at half their value, and if assessable at all they should be assessed at full value.

11. The said Court cannot add to or increase the assessment of an elector.

12. The said assessment is irregular, and the proceedings before said Court in relation thereto, the final decision and the assessment as finally passed, are all irregular.

13. On the grounds in said return and affidavit and exhibits appearing.

Unless cause to the contrary be shewn before the Supreme Court *in banco*, at Halifax, on Saturday, the 21st day of December, 1878.

By the Court,

(Sgd,) M. I. WILKINS,
Prothonotary.

Halifax, 10th December, 1878.

The rule was argued this Term before SIR W. YOUNG, C. J., DESBARRES, MCDONALD and SMITH, J J.

Graham, for rule.—As to property taxable, cites *Nicoll* v. *Douglass*, 35 U. C., Q. B., 126; also same case on appeal in *37 U. C., Q. B.*, 51. Refers to by-laws, section 1, and 5th clause of sub-section 9, (set out in the judgment of SIR WILLIAM YOUNG, *post* p, 255). In connection with this see Revised Statutes, chapter 21, section 15, schedule A.

Stock in banks and insurance companies cannot be called chattels. Such an investment amounts to little more than a debt. If the bank is assessed, the shareholders cannot be assessed in regard to their stock. The Court of Revision and Appeal was proceeding *ultra vires*. It had no power to add to the assessment. The Court of Revision and Appeal is created wholly by the by-law, and is not contemplated by the charter. It will not do to come in now with affidavits shewing that notices were given. The fact should have been proved

at the trial, in order to give the Court jurisdiction. A. C. Bell attended, but Mr. Fraser and Basil Bell did not. The Court ought not to have proceeded without proof of notice of increased assessment. The evidence on which they proceeded was defective. There was no legal proof of the holding of the bank stock or its value. There is no power to assess on half the value of the stock.

Rigby, Q. C., contra.—This Court has no power to review or modify this assessment. If the assessment can be set aside because only half the value of the stock was assessed, it would follow that the parties could come in, and by shewing that property was assessed for one dollar less than its value, have it set aside. If the contention of the learned counsel is sound an assessment could be upset for any irregularity. The roll as passed is, according to the by-laws, to be valid, notwithstanding any irregularity. *Bank of Nova Scotia* v. *Town of New Glasgow*, 2 R. & C., 39. If they have a right to assess Fraser at all, this Court cannot enquire how the assessment is made up, and say that certain property is assessed too much, or that other property should not have been assessed. The assessment is virtually made by the Town Council. The Council, having the power to assess, for the sake of convenience delegate part of their authority to three of their number. Those three do not make the assessment, but after examining the rolls report back to the Council, by whom the assessment is then made. *Queen* v. *Bolten*, 1 A. & E., (N. S.,) 66; also *Allan* v. *Sharp*, 2 Exch., 352, 365; *Earl Radnor* v. *Reeve*, 2 B. & P., 391; *Scragg* v. *City of London*, 26 U. C., Q. B., 263.

The case of *Nicoll* v. *Douglass*, turns on the fact that the bank was taxed on stock at its headquarters, and that it could not be assessed twice. If it could be shewn that the stock was assessed in Halifax it might be exempt in New Glasgow, but a bank in Halifax is only assessed upon real estate, furniture, and profits on the city business for the previous year. Therefore the stock for which Fraser was assessed had not been taxed previously. The parties here are seeking to establish a different mode of assessment for themselves from that adopted in regard to other rate-payers. In the cases of A. C. Bell and Basil Bell there was evidence to shew that notice was given.

A writ of *certiorari* can only be directed to a Court, but here it is directed to three individuals. *Quo warranto* would be the remedy, if any. Of course where a Court goes out of its jurisdiction *certiorari* will lie. The by-laws give the Council the power to regulate the assessments. They have power by the statute to provide for regulating the mode of assessment and levying the same. The following is the Minute of Council confirming the assessment, as revised by the Court of Revision and Appeal; "On motion, the Assessment Rolls, as revised by the special committee, passed unanimously." The special committee was the Court referred to. The Council has the right to fix the assessment. Can this Court go behind the roll they make up and pass in order to find out how it is made up? We have evidence to shew that the roll was passed by the Council, and there is nothing to shew that they should not have made it up in the way they did.

It is contended that if the corporation have assessed the bank they cannot assess the individual stockholders, but there is no evidence that they have assessed the banks. I do not attach so much weight to that, but it would open the way to much uncertainty and controversy if this Court should review the assessments. See section 46 of the Act to Incorporate the Town of New Glasgow, 1875, chapter 49.

Graham, in reply.—Not only is *certiorari* the proper remedy in this case, but it is the only remedy. That writ would not enable the Court to review a question of overvaluation, but the Court below having had no jurisdiction to assess in respect to bank stock, this Court can review its proceedings. In *The Bank of Nova Scotia* v. *The Town of New Glasgow*, the ruling was the reverse of that contended for. The case in *1 Q. B.*, 66, explains the doctrine of *certiorari*. The question is whether the Court had power to enter upon the enquiry, not whether their conclusions were right. All I contend for is the common law right irrespective of statute. The object of the statute was to enable persons who had lost the right of appeal to bring the case up by *certiorari*. The inferior Judges were, perhaps, a little oppressive. All the cases are given in *Creppe* v. *Durden*, 1 Smith's Leading Cases, 1091. (YOUNG, C. J.—We have held in *O'Connor* v. *Condon*, that where the lower Court had no jurisdiction, the whole

matter was void and *certiorari* will not lie.) I think the case on which that decision was based is distinguishable. There is no remedy to quash the Assessment Roll except by *certiorari*. Part of the roll is good. There is a case where trustees improperly got up a list, and it was removed here by *certiorari*.

Rigby, Q. C.—The question was never raised in that case.

Graham—I admit that.

Rigby, Q. C.—I think the principle is that *certiorari* will lie where the Court has jurisdiction over the subject matter, though it may not have jurisdiction in the particular case.

Graham.—See *Cooley on Constitutional Limitations*, 398, as to jurisdiction. See also *Buler* v. *Gilliat*, (unreported.) In a case unreported a decision was given in the Probate Court in a matter in which they had no jurisdiction, and it was held that *certiorari* was the proper remedy.

As to what are to be considered as chattels, see judgment of the Court *per* McCULLY, J., in *Re Bank of Yarmouth*, (unpublished.) In the following cases there was no jurisdiction over the subject-matter;—*17 U. C., Q. B.*, 262; *15 U. C., Q. B.*, 168. The writ could not be addressed to the municipality, because there was no act done by the municipality which we could attack. If the *certiorari* is improperly directed, the remedy is simply by moving to set it aside. *Ex parte McKinlay*, 1 Pugsley, 219; *Ex parte Gilbert*, 1 Pugsley, 231; *The King* v. *Justices of Sommersetshire*, 6 D. & R., 469, as to the case where Justices have acted wholly without jurisdiction. *13 Q. B.*, 988, as to cases of jurisdiction. *14 Q. B.*, 63; *El. Bl. & El.*, 100; *2 W. Black.*, 1330; *11 Ad. & El.*, 993; *14 Q. B.*, 854; *Rex* v. *Grant*, 14 Q. B., 43, *per* Lord DENMAN, C. J., pp. 61, 62. It is held in these cases that where the Court has no jurisdiction *certiorari* must lie, even when taken away by statute. If a warrant is issued for these taxes, where part of the assessment is good and part bad, I don't know what remedy there would be unless we can attack the proceedings by *certiorari*.

SIR WILLIAM YOUNG, C. J., now, (January 19th, 1880,) delivered the judgment of the Court:—

This is the second case that has come before us complaining of assessments by this corporation, the former being that of the Bank of Nova Scotia, reported in *3 R. & C.*, 32. The

present has led to a more searching and extended inquiry into the powers of the corporation under the acts of 1875, chapter 49, and 1877, chapter 57, than was suggested at the argument or entered into the decision of the former case. In that case I took occasion to remark on the large and uncontrolled authorities conferred by the acts incorporating this and other municipalities, and especially on their rights of taxation, which, even within their acknowledged jurisdiction, might be wisely subjected, I think, to some revision by an independent tribunal. The powers invested in these municipalities under their respective acts have in several instances been entirely misapprehended, and in none of them more conspicuously than in New Glasgow. The Act of 1875 was followed by a body of by-laws or ordinances, approved, as I have learned, by the Lieutenant-Governor in Council on the 4th of March, 1876, which I have read with some surprise. They establish a Municipal Court, with a civil and criminal jurisdiction, for which there is no authority in the Act of 1875, though it has since been confirmed by the Act of 1877. They establish also a Court of Appeal and Revision, with power to administer oaths, for which there is no authority in either Act, and which must be regarded as wholly illegal. But a still graver objection applies to the whole of the third chapter of assessment, which comprehends a new law founded mainly on chapter 21 of the Revised Statutes, but differing from this in many essential particulars, taxing property, both real and personal, in the town, as ordained by the Warden and Town Councillors, which the Act of 1875 does not even subject to the revision of the Governor-in-Council, though they were submitted, as I have already stated, to that Honorable Body, and met their approval. What would be said if a like power were claimed and exercised in Halifax, where the ordinances of the City Council, part second, are confined to their proper sphere, and the objects and limits of taxation are defined by the Legislature.

The Corporation of New Glasgow are empowered by the 46th section of the Act of 1875 to vote, assess, collect, receive, appropriate and pay the moneys required for poor rates, and all other rates, and shall have within the town all the powers and authority relating thereto vested in the Sessions, Grand Jury and Town Meeting, and by the 52nd section shall have

power to make by-laws, among other things, for substituting assessments in lieu of labor on the streets, and to make all rules necessary for the creating and conduct of the Police and Municipal Court of the town, and for regulating the mode of assessment and levying the same, and generally for all purposes connected with or affecting the internal management or government of the town. It must be confessed that these clauses are loosely and incautiously worded, and have led to pretensions in this, as in other municipalities, inconsistent with the first principles of jurisprudence, and which the Legislature could never have intended to confer on a subordinate body. This leading view, though not suggested or hinted at on the argument, it is essential to bring out and illustrate as I have done, and we must now proceed to the consideration of the case just as if the chapter of assessment in the by-laws were binding.

Now, by the 9th section of chapter 3, of the by-laws, it is enacted that all real and personal property *in the town* shall be liable to taxation, with certain exemptions. This is the governing principle analogous to the rule in the Revised Statutes, chapter 21. By the 17th section of that chapter, all local and direct taxes shall be levied and assessed upon the whole taxable real and personal property of *the locality*, and section 18, sub-section 3 provides for the case of assessment in different *districts of the County*. By the new County Incorporation Act of 1879, chapter 4, section 56, the Municipal Council shall be governed in all things by the laws now or hereafter to be enacted for the levying and collecting of poor and county rates, except as therein provided, and the same shall be apportioned and assessed equally on all property by law liable to poor and county rates. It is clear, then, that no property that is not *in the Town* of New Glasgow is assessable, and the question here has arisen upon certain insurance and bank stocks owned by Mr. Fraser and the Messrs. Bell in the banks at Halifax and Pictou, not doing business in New Glasgow, except a branch of the Bank of Nova Scotia, which is taxed by the corporation at a very liberal rate, and by Mr. Adam Bell in a Marine Insurance Association at Pictou. A question of a like character, though differently expressed, arose in Ontario, where the law exempts from taxation all property,

stocks and other securities which any person may own out of the Province, and in the case of *Nickle* v. *Douglas*, 35 U. C. Q. B., 145, affirmed on appeal in *37 U. C. Q. B.*, 54, it was held that a resident in Kingston owning stock in the Merchants' Bank of Montreal was not assessable therefor. The banks conducted at Halifax and Pictou seek no protection and derive no benefit from the municipal corporation of New Glasgow, and a stockholder there drawing dividends therefrom might just as well be taxed in respect of dividends from the British Funds or an income from any other property situate out of the locality. I am aware of no principle on which such an impost could be upheld, and the rule is that whoever claims a right to impose a burthen on the subject must establish clearly that there is such a right.

Much was said at the argument about the illegal character of the Court of Revision, whether considered as a court or as a special committee. Their decision, imposing those additional burdens for the first time under an extraordinary provision of the Act, was adopted and confirmed by the Town Council, who made it their own, and have maintained it here, and accepted the responsibility. It is with them and not with a subordinate body subject to their control that the parties assessed and this Court must deal.

Objections were taken at the argument to the writs of *certiorari*, as being inapplicable to the case, and as having been addressed to the Court of Revision, and not to the Town Council. The first point I considered very fully in my former judgment, (*3 R. & C.*, 37,) pointing out the distinction between the writ as it is understood in England and as it has been constantly in use with us. I would have had more, and, perhaps, an insuperable difficulty, had the writs been addressed only to the Court of Revision having no jurisdiction, on the authority of *O'Brien* v. *Welsh*, 28 U. C., Q. B., 402, but they are addressed also to the Town Clerk appointed under the 49th section of the Act of 1875, which enables us to sustain them, and as some doubt rests upon the form, the rule *nisi* will be made absolute without costs.

CALDWELL *v.* STADACONA FIRE & LIFE INS. CO.

PLAINTIFF, in an action on a policy of insurance, referred in his declaration to "the conditions endorsed on the policy, and which constituted the basis of said insurance," but he only set out one condition referring to notice and proof of loss, alleging that it was the only condition material to his cause of action, and he averred general performance of conditions. Defendant pleaded; that the action was not commenced within six months after alleged loss, and the same was not sustainable under the said conditions endorsed on said policy; and, by another plea, that by said policy the loss, if any, was made payable to one Anderson, and before the alleged loss the defendant Company, by notice to said Anderson, terminated the insurance, and said Anderson agreed to terminate the insurance and deliver up the policy to be cancelled.

Held, that these pleas were bad under secs. 151 and 152 of the Practice Act as they did not allege or show that the policy contained any conditions requiring the action to be brought within six months, or enabling the Company to terminate the insurance by notice; and that the objections to the pleas were not such as could be obviated by amending them under section 134.

THIS was an action on a policy of insurance. The plaintiff in his writ referred to the "conditions endorsed on the policy, and which constituted the basis of said insurance," but he only set out one condition at length, namely, that referring to notice and proof of loss, alleging that it was the only condition material to the plaintiff's cause of action, or essential to said contract, and he averred general performance of conditions.

The defendant pleaded among other pleas the following:

Ninth. For a ninth plea to the first count of plaintiff's writ the defendant says that this action was not commenced within six months after the alleged loss, and the same is not sustainable under the said conditions endorsed on said policy.

Twelfth. And for a twelfth plea to said count defendant Company says that by said policy the loss, if any thereunder, was made payable to one George R. Anderson who held said policy, and that before the alleged loss the defendant Company, by notice to the said George R. Anderson, terminated the insurance effected by said policy, and required him to give said policy up to be cancelled, and the said Geo. R. Anderson did agree to terminate said insurance, and delivered up said policy to the defendant Company to be cancelled accordingly before said loss.

The plaintiff demurred to the ninth plea on the following grounds:

First. Because in the absence of a special condition to the contrary the plaintiffs would have a much longer time in which to bring their action upon said policy than six months, and said plea does not set up or allege that said policy contained any

condition whatever whereby the plaintiff's right to sue was limited to the period of six months next after said alleged loss.

Second. Because, under the law governing contracts such as said policy was, the plaintiffs would not be limited to a period of six months next after a loss under said policy within which to sue therefor, and, inasmuch as said plea does not set up or allege that said policy contained or was made subject to any condition limiting or fixing a period within which the plaintiffs could alone sue thereon for an alleged loss thereunder, it is no answer to the count to which it is pleaded.

To the twelfth plea they demurred on the following grounds:

First. Because the said plea does not allege or show that the said policy contained any condition empowering the defendant Company at any time to terminate said insurance by giving notice of such their intention, and, in the absence of such condition the defendant Company could not without the consent of the plaintiffs cancel said policy, and no consent is alleged to have been obtained therefor.

Second. Because, although any loss under said policy was payable to the said George R. Anderson, yet the said George R. Anderson could not, without the consent thereto of the plaintiffs, and of said plaintiff Samuel Caldwell, cancel or agree to cancel said policy, and any agreement made by said George R. Anderson in that behalf was invalid and void, and of no effect whatever, so far as the plaintiffs were or are concerned, and there is no allegation or averment in said plea to the effect that the plaintiffs, or either of them, had notice of or knew of said intended cancellation, or consented thereto.

Third. Because the mere fact that a policy of insurance is made payable in case of loss to a party other than that to whom such policy was issued gives no right or power to such other party to deal with said policy hostilely to the interests of the party to whom such policy was issued, or to surrender such policy, or agree to cancel the same.

The demurrer was argued this term before SIR WILLIAM YOUNG, C. J., MCDONALD, SMITH and JAMES, JJ.

Meagher, in support of demurrer, refers to R. S., cap. 94, secs. 138 and 151. It was incumbent on the defendant to

show that there was in the policy a condition of such a character as would disentitle the plaintiffs to recover after the lapse of six months from the loss. The statute requires all defences to be specially pleaded, which they have not done. The policy being a deed under seal we would have twenty years to bring an action, unless deprived of it by the condition or contract. The last part of the plea is not connected with the first. For all that appears in it, the last part may refer to different conditions altogether. As to continuance of contract see *L. R.*, 8 Chancery, 949. They seek to limit here a contract to six months which is generally good for twenty years. See on the same point *Bullen & Leake*, p. 60. The plea presents no issue on which a Judge or jury could determine why it was limited to six months.

As to the twelfth plea see *Canada Law Journal*, Jan. 18th, 1878. A payee of a policy cannot deal with it as his own. The plea does not show that any condition enabled the Company to terminate the policy by notice. If such a power were given it should have been specially pleaded. In the absence of such an averment the existence of the right cannot be presumed. The defendants should show, first, that there was a condition which entitled them to cancel the policy; secondly, that plaintiffs had parted with their interest, and that Anderson had not been paid his claim, and that it covered the whole.

Ritchie, Q. C., contra.—The conditions are set out in the 34th line of the declaration in these words; "Subject to the conditions endorsed on said policy, and which constituted the basis of said insurance." It refers to conditions on the policy on which the contract was based. The plea refers to those conditions. I am not bound to plead the conditions. They are set out in the declaration, and I say that under these conditions they cannot recover. The question is whether the plaintiff having referred to the conditions, I am bound to set them out more fully. If they had not said the policy was subject to conditions I would have done it. (McDONALD, J.—The declaration does not say a word about the six months.) Cites sections 121, 123 and 124 of Practice Act.

In reference to plea that the loss was payable to George R. Anderson, and terminated by notice to him,—his interest

was absolute. If he had a right to bring the action he had a right to give up the policy. There is no evidence here that the plaintiff retained any interest. If the policy was payable to Anderson it is for the other side to show an interest in the plaintiff. (SMITH, J.—The question is whether a man who is the payee under a policy can cancel it without notice to the other party.) He makes himself responsible. (YOUNG, C. J.—He may be an insolvent. It is not enough that he may be responsible. We have no insight into the reasons of the cancellation.) It was not cancelled against Anderson's will but with his consent. (JAMES, J.—Could a mortgagee release without the consent of the mortgagor where the insurance was for his benefit?) I think so. Where a party gives property to another in trust he is responsible for the acts of the latter. (MCDONALD, J.—The policy shows an interest in the plaintiff. The loss is payable to him.) There may be a variance between the declaration and the proof. I say it is payable to Anderson. An issue of fact is raised the moment that is admitted.

JAMES, J., now, (January 18th, 1880,) delivered the judgment of the Court:—

This is a demurrer to pleas in an action against a Fire Insurance Company. The plaintiffs, who are the parties insured, in their writ refer to certain conditions as being endorsed on the policy, and which constituted the basis of the insurance, but only set out one of the conditions, viz., that which required notice and proof of loss, and they aver general performance of conditions.

The defendants in their ninth plea say, "that the action was not commenced within six months next after the alleged loss, and the same is not sustainable under the said conditions endorsed on the said policy."

By their twelfth plea the defendants allege that by the policy the loss was made payable to one Anderson who held the policy, that before the loss the defendant Company by notice to the said Anderson terminated the insurance effected by the policy, and required him to give it up to be cancelled, and that Anderson agreed to terminate the insurance and give up the policy.

To these pleas the plaintiff demurred, giving for reasons, in substance, that the ninth plea does not set out or allege any condition annexed to the policy limiting the plaintiffs' right of action to six months; that the twelfth plea does not set out or allege any condition empowering them to terminate the policy; that although Anderson was the holder of the policy, and it was payable to him, he could not terminate the insurance without the consent of the plaintiff, and no such consent, nor any notice to plaintiff of any intended cancellation of the policy is alleged, nor does the plea set out any right or authority in Anderson to act hostilely to the plaintiff's interest or to surrender the policy.

It was scarcely contended at the argument by defendant's counsel that either of the pleas was sufficiently explicit, and it does not require any reference to authorities to enable us to form a very decided opinion that they are defective in each of the several particulars set out in the demurrer. It was not the policy of the Legislature in the Practice Act to render unnecessary in any pleading allegations which were necessary under the old Common Law practice, except such as were merely formal, and such as are specified in the Act. Section 138 enacts that, "in actions on specialties and covenants, all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." It is true the act provides for simplicity and brevity in all pleadings, but it does not sanction the omission of what was before necessary to constitute a good special plea. Section 151 permits a plaintiff or defendant to allege performance of conditions precedent in general language, as the plaintiff has done; but enacts that "the opposite party shall not deny such averment generally, but shall specify the condition or conditions precedent, the performance of which he intends to contest," which the defendants have omitted to do; and section 152, which abolishes the general issue, requires that every pleading shall specify *particularly* and concisely the facts intended to be denied. Precision and accuracy are as much required in our concise forms of pleading, as they were in the far more voluminous precedents familiar to the senior members of the legal profession. The statute is our guide as far as it goes, and when it fails us we

must go to the old practice to ascertain the substance of our pleadings. Upon this test the pleas are no doubt defective, as set out in the demurrer.

But it was contended at the argument that the objections to the pleas, as set out in the demurrer, if valid, were such as to bring them within the operation of sections 123 and 124 of the Practice Act. Section 123 provides that, except in certain cases, no pleading shall be deemed insufficient for any defect now objectionable on special demurrer only. Section 124 provides that mere duplicity, argumentativeness and uncertainty, not tending to deceive or embarrass the opposite party, shall no longer be objections, but that such pleas may be compulsorily amended under a Judge's order on application of the opposite party. Although disposed to give the fullest operation to this useful provision, I do not think the objections here are of the nature specified. They are calculated to embarrass the plaintiff, it is true, that is, if he is compelled to answer them; but their defect is not that sufficient matter is stated in a bungling or insufficient or purposely misleading manner, but that what they do state, is insufficient, if true, to exonerate the defendants from plaintiffs' claim. It is surely no injustice to a party who has a knowledge of the facts and the command of the whole English language wherewith to express them, to ask him to shew sufficient facts to found his case or defence. How can a party be reasonably called upon to answer a pleading which, admitting it all to be true, discloses no defence to the action? If we exonerate a party—plaintiff or defendant—in pleading from the responsibility of stating the facts, in however brief or even bungling a manner, on which he relies, the whole benefit of our system of pleading will be at an end, and every plea, instead of being a guide to the opposite party in preparing his answer or framing his case or defence, will be but a trap to ensnare him into a false position, and such a decision of this Court would open a wide door to fraudulent and dishonest pleading. No authorities were cited to shew that the objection here taken to the pleas would, before the act, have been grounds for special demurrer only, so as to bring them within section 123, nor do I think it necessary to do so. If there were such decisions, which I do not apprehend, they would raise a conflict between sections 122 and 121

of the statute. The latter section, which was cited by defendant's counsel, enacts that, either party may demur on the ground that the pleadings "do not set forth a sufficient ground of defence." This is the character of all the objections set out in the demurrer, and I am of opinion that each of the two pleas fails to set out a sufficient ground of defence. I think the plaintiff should have judgment on the demurrer to both pleas.

CITY OF HALIFAX *v.* ROMANS.

An action was brought against the defendant for his share of the expense of constructing a sewer on South Park Street, and a book was tendered in evidence as the Minute Book of the City Council containing the resolution authorizing the construction of the sewer, but was rejected. The City Clerk explained as to this book that notes were taken of proceedings of the Council by himself when present, and in his absence by his assistant, and were afterwards transcribed more fully into the Minute Book from the pencil notes taken in the first instance, and certified by the Mayor at the following meeting of Council.

***Held*, that as the resolution in question was a public official act of the City Council, registered in the book kept for the purpose, entered by the proper officer and authenticated by the signature of the Mayor, the book should have been received in evidence.**

THIS was an action brought by the city against defendant to recover his proportion of the cost of constructing a sewer on South Park Street, in front of property of the defendant. The Judge of the County Court, before whom the cause was tried, refused to receive in evidence a book tendered by the plaintiff as the minute book of the City Council, on the ground that its contents were not the original minutes of the Council, the original entries of the Clerk being made in pencil and afterwards copied into the book. This decision was appealed from, and the appeal was argued this Term before SIR WILLIAM YOUNG, C. J., RITCHIE, E. J., DESBARRES and WEATHERBE, J J.

Shannon, Q. C., for appellant, refers to City Charter of 1864, in *City Laws & Ordinances*, page 15, section 106; *Ibid.*, page 206, sections 39, 40; also acts of 1864, chapter 87, section 1. The only question is as to whether the minutes produced by the proper officer and kept by him should not have been received; see 36 & 37 Vic., chapter 33, cited in *Powell on Evidence*, 343. It is provided in the ordinances that an Assistant may take the minutes of the Council.

Thetford's Case. 1 Viner's Ab., page 90, section 16, is the oldest case on corporation books. The doctrine is there strongly laid down that the books of the corporation are proper evidence, though some account must be given as to where they are kept and by whom. *Rex* v. *Motherwell*, 2 Strange, 92, is the leading case as to what corporation books may be given in evidence. An important case is *Rex* v. *Yovely*, 8 A. & E., 806. (YOUNG, C. J.—Does that law extend to all corporations?) We are only speaking of municipal corporations. See also *Rex* v. *Martin*, 2 Camp., 101, which shews that the books of the Bank of England would be evidence for a great variety of purposes. See also a note to this case as regards municipal corporations. See *Saunders on Pleading and Evidence*, 851; *2 Taylor on Evidence*, page 1484, section 1781. The books here are obviously of a public character, and the entries made by the proper officer. The general rule is laid down in *1 Greenleaf*, section 493, also in *Powell on Evidence*, 343. See also *2 Strange*, 984.

McCoy, Q. C., contra.—I don't dispute the law, but only its applicability.

WEATHERBE, J.—The law implies that the minutes are to be engrossed.

Ritchie, Q. C., with *Sutherland, Q. C.*—The practice is to sign at the next meeting.

McCoy, Q. C.—The only evidence below was that Rhind, who signed those minutes, acted as City Clerk for a number of years. The act requires the duties of officers to be defined by the ordinances, and to shew that Rhind was the proper officer these ordinances should have been produced. No clause in the act prescribes the functions of the City Clerk, which must be defined by the ordinances. To make the minutes admissible they must be taken by the proper officer. There is no evidence to shew that Rhind was the proper officer, or that he took these minutes. (WEATHERBE, J.—Is not the signing by the Mayor or Alderman enough?) Not by itself, unless the act makes it so.

Shannon, Q. C.—Page 16 of the act provides for the election of an Assistant City Clerk.

McCoy, Q. C.—It is not enough that the assistant took the minutes. The assistant could have been produced to prove that he took the minutes. (RITCHIE, E. J.—Suppose the parties were all dead?) Is it not necessary to shew that the books here are kept by the proper officer? If so, is that proved? A municipal corporation here has no more rights than a private one. (RITCHIE, E. J.—Is it not enough that the Clerk says that the minutes were kept by him or his assistant, and that they were signed by the Mayor?) It is not a compliance with the law for the City Clerk to say that he does not know who kept the minutes. See the case reported in *5 B. & A.*, 864. In this case it was held that the minutes of a corporation were not evidence for themselves. This was not a subject of a public character. In *3 B. & Ald.*, 142, public books of a corporation were rejected on the ground that the entry in question was not of a public nature. The question in the present case turns on the same point. A public matter is a resolution passed in relation to the citizens, such as that in reference to assessment. Passing an ordinance would be a public matter. Section 102 of the Charter provides for four quarterly meetings on days specified by the by-laws. In addition to these there are special meetings at which certain things only can be done. The notice must specify the business. (RITCHIE, E. J.—Is it not to be assumed that they acted in accordance with the law?) I don't think so. Admitting that Rhind was the proper officer, there is not evidence that he took the minutes. Neither is there any evidence to shew who the Assistant Clerk is, or that the minutes were taken by him. If Rhind proved who the assistant was, and that the minutes were taken either by him or his assistant, the case would be stronger against me. Rhind admits that the minutes copied into the book by him were not always copied from the original notes.

This is a private matter and not one affecting the public generally. *Dillon on Municipal Corporations*, 617, shews the distinction. An assessment is something levied on an individual for the benefit of a particular locality. Here, on the passing of a resolution, a debt arises due to the corporation of a particular character. If the corporation, by passing a resolution, can create a debt due to themselves, it should be strictly proved. *Starkie on Ev.*, 413.

There is no evidence to shew that there is an Assistant City Clerk. The mere fact that the Clerk speaks of his assistant is not sufficient, and does not shew even that an assistant was elected. *1 Dillon on Corporations*, 355; *Stephens' Dig. Ev.*, 40; *1 Greenleaf on Evidence*, sections 484, 491; *2 B. & Ald.*, 183; *3 B. & Ald.*, 142; *8 B. & C.*, 813; *2 Taylor on Evidence*, 1417, 1418. As to costs, I have a case shewing that a corporation having a paid Recorder is not entitled to costs.

Ritchie, Q. C., in reply, cites *1 Dillon*, section 231, p. 345. The minutes here were written by the City Clerk himself, and these are the original minutes, not the pencil notes taken on scraps of paper. It is proved that these fairly written minutes are read at the next meeting of Council, and then certified by the Mayor or Presiding Officer.

RITCHIE, E. J., now, (January 19th, 1880,) delivered the judgment of the Court:—

The question involved in this case is whether the Judge of the County Court was justified in rejecting the book containing the minutes of the proceedings of the City Council, on the ground that they were not the original minutes, that the authentication by the signature of the Mayor is not sufficient without legislative enactment to make them legal evidence, and that no evidence was adduced of the loss of the original resolution.

The action was brought to recover from the defendant his proportion of the cost of constructing a common sewer made and constructed by the city in South Park Street, one of the public streets of the city, in front of property owned by the defendant, under the provisions of the Acts of the Province respecting Sewers in the City of Halifax, whereby the City Council was authorized to sanction or direct the construction of a common sewer, the cost of constructing the same to be borne partly by the city and partly by the owners of the property on the street through which the new sewer is to pass and opposite to it.

The book was tendered in evidence to shew the action of the Council directing the construction of this sewer. The Act Incorporating the City of Halifax directs that among other officers of the corporation there shall be a City Clerk and an

Assistant City Clerk, and that the minutes of the proceedings of all meetings of the Council shall be drawn up and fairly entered in a book to be kept for that purpose, shall be signed by the Mayor or Alderman presiding at such meeting, and shall be open to the inspection of all persons qualified to vote at the election of Mayor or Aldermen, on payment of a fee of twenty cents, the meeting to be held in public. The City Clerk was produced, who testified that he had been such since 1869, and had attended meetings of the City Council for ten years, except on occasions when he had been unwell. He produced the minute book. He had, he said, no recollection of anything outside the book, and could not swear positively that he was present at a meeting of the Council December 22nd, 1874. The minutes are in the minute book of the City Council. No other minute book is kept. The minute book is then tendered in evidence, and he is cross-examined, and says he does not recollect being absent from meetings of the City Council more than six times in ten years; that when absent from any cause his assistant would take the minutes. Notes are taken at the Council Board at the time as each thing occurs, either by himself or his assistant, and afterwards transcribed into the minute book. He takes notes of the minutes of the matters that transpire, and afterwards transcribes them more fully into the minute book. The minutes are a correct copy as far as they go. He takes the pencil minutes home and writes them out. He goes on to say that the minutes are correct, as certified by the Mayor at the following meeting of Council. He wrote out the minutes of December 22nd. He wrote all the minutes in the book, though he might not have taken the original notes. The Mayor signed those minutes.

That it was the duty of the City Clerk or his assistant to attend the meetings of the City Council and take the minutes of their proceedings cannot be questioned, and this the learned Judge has recognized, but he does not consider the book produced the original minutes. I cannot consider the rough pencil notes taken by the Clerk or his assistant on loose sheets of paper to be the minutes contemplated by the act, which are directed to be drawn up and fairly entered in a book to be kept for that purpose, which shall be signed by the Mayor. The book produced is that kept for that purpose, and the only

book in which the proceedings of the Council are recorded. If those loose sheets had been produced the Judge would have been well justified in rejecting them as evidence. The Judge says, as one of the grounds for rejecting the minute book, that there was no evidence of the loss of the original resolution, but the production of the paper on which the resolution was written which was submitted to the Council would of itself have proved nothing. I find it laid down that the minutes of the corporation of a city are receivable as evidence without further proof if referring to matters of a public nature, and are competent evidence of the acts and proceedings of the corporation in relation to such matters. If questioned it must appear that they have been publicly kept by the proper officer, and when the book is produced it must be shewn that it is the book of the corporation, and does not relate to matters of a private nature. All the cases referred to at the argument recognized this to be the law, but it was urged that the act of the Council in directing the construction of the sewer was not of a public nature. I cannot adopt that view. It had relation to a public sewer, and in the acts of 1873 and 1874 the distinction is made between public sewers and private drains, and proceedings in relation to the common sewers of the city are of as public a character as proceedings relating to public highways.

I think, therefore, that this being a public official act of the City Council, registered in the book kept for the purpose, and entered by the proper officer, that book, authenticated as it is by the signature of the Mayor, should have been received in evidence. The words of the statute might seem to imply that the minutes should have been entered in the book and signed by the Mayor at the meeting, but the statute does not expressly say so, and this objection was not taken, nor do I think that, if taken, it could have prevailed.

MEAGHER *v.* COLEMAN.

DEFENDANT distrained on the 25th of March for a quarter's rent due by plaintiff who brought an action of replevin, and put in evidence a deed from defendant to one Walsh, conveying away the reversion dated March 1st. The grantee in the deed, called by plaintiff, proved that the deed was not delivered for some days, perhaps a fortnight or a month after the date it bore; and defendant said she did not know on what date she signed the deed, that it was some weeks after the 1st of March, that the grantee had not on the 25th of March got possession, and the plaintiff was still her tenant.

Held, that the presumption arising from the date of the deed had been rebutted, and it was the duty of the plaintiff to establish the fact of the delivery of the deed before the date of the distress to the satisfaction of the Judge who tried the cause without a jury, and that as he had not done so the verdict for defendant could not be disturbed.

WEATHERBE, J., *dubitante*.

ACTION of replevin, tried before the learned Chief Justice, without a jury, and in which a verdict was found for defendant. Rent was distrained for by the defendant on the 25th March, and a deed bearing date March 1st from the defendant, the landlady, to one Thomas Walsh was put in evidence. The defence turned mainly upon the question whether the deed had actually been delivered before or after the date of the distress. A rule *nisi* was taken under the statute to set the verdict aside, which was argued before SIR WM. YOUNG, C. J., RITCHIE, E. J., SMITH and WEATHERBE, J J.

Wallace, for rule.—The action is brought to recover property taken under a claim for rent. The main point is that the party who distrained did so without having the reversion in the property, having conveyed it away before the distress was made. There was also an equitable plea that the cost of certain repairs made by the tenant on the property was to be deducted from the rent. There was no right to distrain, the property having gone out of the hands of defendant. The date of the deed fixes the date of delivery. Whether there was a deed or not, I don't think the distress could be made, the property having been sold. (RITCHIE, E. J.—The evidence distinctly destroys the presumption that the deed was delivered on the date.) That is not enough. If they desire to destroy the presumption, they must show some other date. (WEATHERBE, J.—I don't see how the parties can relieve themselves of the *onus*, unless they go further and show another date.) See *2 Exch.*, 191; *6 Exch.*, 716; *19 L. J.*

Chancery, 849; *5 Bing., N. C.*, 300; *7 Scott, N. S.*, 214; *6 M. & G.*, 527; *8 A. & E.* 645, showing that the date a document bears is *prima facie* evidence.

The lease to Meagher was made in 1867, 1st September, for two years, with a right to renew for three years longer. Meagher continued in possession until the time of the distress. There was a provision in the lease for the allowance by the lessor of money paid by the lessee for certain fittings that he was to put in. If they could not agree arbitrators were to be appointed. I contend that this was a covenant running with the land which bound the assignee. The assignee would be bound, at all events, because he was specially mentioned. At the trial it was proved that the amount expended was $147. The question is whether the parties taking the property were not bound by this agreement. (RITCHIE, E. J.—The amount was payable at the end of the term.) Plaintiff thought he would let it run on until he went out. The right did not accrue until the end of the five years. Continuing in the property, the lease, with all its provisions, was continued from year to year, at all events. Defendant became bound the moment he continued the lease, even for one year, and the fact of increasing the rent the following year would not divest a right once fixed. It bound the land under the lease for five years. (RITCHIE, E. J.—Would it not be assumed by a person purchasing at the end of that time that the amount was paid, especially when the plaintiff goes on from year to year without making any demand?) Mrs. Coleman became the assignee of the property before the expiration of the renewal, which must be assumed to have been on the same terms. (WEATHERBE, J.—It does not appear to come out of the rent.) (RITCHIE, E. J.—It cannot come out of the rent, because rent must be paid.) Not as an offset, I admit, but I think we can under an equitable plea. (RITCHIE, E. J.—There is no principle in Equity which would enable you to do this.) There was no alteration in the lease until there was an alteration in the terms, which was two years after Coleman's death. Previous to that the plaintiff continued in possession under the terms of the old lease. I contend that lease is renewed for another term.

Motton, Q. C.—I admit the general principle that the date of a document is *prima facie* evidence of its execution on the day it bears date. But *Brown* v. *Burton*, 5 D. & L., 289, is precisely in point where doubt is thrown upon the date, and shows that it is to be "utterly disregarded." *5 D. & R.*, 507. The case in *2 Exch.*, 191, merely shows that the date of a letter is *prima facie* evidence. This is one of the cases where parol evidence may be admitted to contradict a deed. (WEATHERBE, J.—My difficulty is that no other date is established.) Then it becomes a case for a jury. (WEATHERBE, J.—The Chief Justice has only decided that the *onus* is shifted.) Mrs. Coleman's uncontradicted evidence is that at the time of the distraint defendant was there as her tenant. (RITCHIE, E. J. —That must have been because the deed was not delivered.) I think I can show conclusively, from the evidence, that the relations of landlord and tenant continued to the time of the distraint. Walsh says that it may have been a month before the deed was delivered, which would cover the time.

Wallace, in reply.—We cannot be defeated by mere conjectures of the witnesses.

SMITH, J., now, (January 19th, 1880,) delivered the judgment of the Court:—

This is an action of replevin, brought by the plaintiff to recover possession of certain goods taken by distraint by the defendant for a quarter's rent alleged to be due her by the plaintiff. It was tried before His Lordship the Chief Justice during the last November sittings, and judgment was given for defendant, and a rule *nisi*, under the statute, was taken out to set aside the verdict, which was argued before us during the present term. No question arises with respect to the tenancy or amount of rent due; but to the defendant's avowing the plaintiff has pleaded several pleas, one of which is pleaded on "equitable grounds," and which sets out a covenant or agreement in the lease, under which the plaintiff held the premises, and made between him and the husband of the defendant, who died 1st October, 1872, after which period plaintiff attorned to defendant. I think Mr. Wallace, at the argument, felt that such a claim could not be set off against rent accruing due to defendant since the husband's death, and

that if such were recoverable, it could only be urged against deceased's estate. I have no doubt that this plea cannot be sustained.

The plaintiff's third plea alleges that at the time the distraint was made the defendant had no right to make it, inasmuch as she had previously sold and conveyed the demised premises, and transferred her right and title in the property to another. Had the plaintiff established this transfer to have existed when the distraint was made, it would have been incumbent upon us to decide whether this defence could have been legally sustainable; but at present we have only to enquire whether this fact has been proved, as it was the duty of the plaintiff to do when seeking to deprive the defendant of her rights. It was strongly urged upon us by Mr. Wallace that the deed, which undoubtedly transferred the property from defendant to Walsh, and which was produced at the trial, *prima facie*, must be taken to have been *delivered* on the 1st March, as it bears that date upon its face. No law can be more clear than that involved in this proposition. I have looked carefully into all the authorities cited and they bear out this principle, *but nothing more*. But is this the case we are considering? The burthen of proof rested upon the plaintiff, and had no other evidence been produced, the deed, beyond question, must have been regarded as delivered on the 1st of March; but when we turn to the evidence we find the date falsified as indicating delivery on that day, and the *presumption* of law rebutted. When, therefore, the fact of delivery at the time when the plaintiff says it was *presumably* so delivered is contradicted, I cannot understand how the burthen of proof is shifted from him to defendant. The authorities do not so hold, but exactly the reverse. In a case to be found in *5 Dowl. & Lowndes*, 289, PATTESON, J., says:— "The date is indeed to be taken *prima facie* as the time of execution; but as soon as the contrary appears the apparent date is to be utterly disregarded." *Street* v. *Smith* establishes the same principle. In *Styles* v. *Wardle*, 7 Dowl. & Ryl., 507, BAYLEY, J. says; "It may, however, happen that the lease may be dated on one day, and may in fact have been executed on a subsequent day; and if that be so the lease takes effect from the day of the delivery and not from the date." Now

Let us see if there is any evidence that the deed here was not executed on the 1st of March. What does Walsh, plaintiff's own witness and the party to whom the deed passed say? "The deed was not delivered for some days after the date. Might have been a fortnight or a month after." The defendant also testifies, "It was some time after the purchase that the deed was given. Walsh was to get the rent from the 1st of March. I don't know on what day I signed the deed. It was some weeks after the 1st of March." She also says; "Walsh had not got possession and plaintiff was still my tenant when I distrained." I am not unmindful of the unimportance of this latter statement if regarded alone and if the delivery had actually then taken place, but it is a fact significant when taken with the other testimony as pointing to an incomplete legal transfer of the property at that period. With the *prima facie* execution of the deed on the 1st of March being thus destroyed, and it being the plaintiff's duty to establish the delivery at that date or before the distraint, and having failed to do so, I do not see that the judgment could be for the plaintiff, and I therefore concur in the verdict, and think the rule must be discharged with costs.

Sir William Young, C. J.—It is a principle of practical jurisprudence that a landlord who parts with his reversion loses the right to distrain. There are two or three cases to the contrary, but this seems to be the settled law and it ought to be familiar. It was admitted in this case that a sum of $110 was due for rent by Meagher. On that point there is no dispute. But the question is whether the landlady, who had conveyed her land away, retained the power to distrain, and that in turn depends upon the question when the deed was delivered. It was dated the 1st of March, and *prima facie* the deed was delivered on that date. The evidence, however, was that it was not recorded until the 15th of April, and a clear impression was left on my mind that the deed did not pass the title on the 1st of March, nor until after the distress was made. The landlady herself swore that when she distrained she was still in possession. Therefore, the rent being due and the merits being all with the defendant, I was not displeased to find that the law permitted us to uphold the distress.

RITCHIE, E. J.—It was admitted that rent was due, but it was contended that the landlady had parted with the reversion before the distress was made, and therefore had no right to distrain. A deed was produced from her to one Thomas Walsh, which bore date the 1st of March, and the distress was on the 25th of that month. Walsh, who was called by the plaintiff, said that the deed was not delivered to him on the day of its date; was not delivered for two days after; might have been a fortnight or a month after. The defendant says that when she distrained Walsh had not got possession, and plaintiff was still her tenant; that it was some time after the purchase that the deed was given to Walsh; she does not know what day she signed the deed; it was some weeks after the 1st of March. It was for the plaintiff to shew that the defendant had parted with the reversion. This he did not do to the satisfaction of the learned Chief Justice, who tried the cause. He has, in my opinion, left that in doubt which it was for him to make clear. The deed, of course, could only take effect from its delivery; the date would only have been *prima facie* evidence of the delivery, and that is destroyed by the plaintiff's own evidence that it was not then delivered, and might not have been delivered for a month after, or until after the distress had been made.

The rule *nisi* should therefore, in my opinion, be discharged.

WEATHERBE, J., delivered the following opinion:—

The deed from defendant to Thomas Walsh, bearing date 1st March, 1875, was put in evidence by plaintiff to shew that the land and premises upon which the distraint was made had passed out of defendant on the 25th day of March, 1875, the date of the distraint, and this deed so dated was *prima facie* evidence that the delivery had taken place before the 25th, and on the 1st of March.

BOSANQUET, J., said, in *Anderson* v. *Weston*, 6 Bing. N. C. 300; "Now, when a deed is produced, and the execution of that deed is proved * * * * and that deed bears a date, so far as my experience goes that date has uniformly been taken to be *prima facie* evidence that the deed was executed at the time when it purports to bear date. It is the practice in cross-examination to enquire whether the deed was executed

when it bears date, but I certainly never heard it contended that it was part of the proof of the person producing the instrument, not only to give evidence of the execution of the instrument, but in the first instance, and before any evidence is offered to render doubtful the time of making the instrument, that it was executed at the time it bears date."

Although it was not necessary that he should have done so, the plaintiff's counsel did go further than merely the proving of the execution of the deed, but he proved by the party to whom the deed was made that it was not made on the day of its date. The witness said; "The deed was not delivered for some days after the date. Might have been a fortnight or a month after." The defendant, Coleman, says; "It was some time after the deed was given," and again; "I don't know on what day I signed. It was some weeks after the 1st of March." This question respecting the delivery of the deed seems to stand in this way. It was incumbent on plaintiff to shew delivery at any time previous to the 25th of March. By putting in the deed he, if he had stopped there, would have done this, and thus would have made out a *prima facie* case that the title had passed to Walsh before the 25th, the time of the distraint. The deed being proved in evidence, how is it and the presumption to be drawn from it affected by the other evidence? If both the parties to this deed who have testified had concurred in stating that the deed was not executed on the very day it bears date, nor for a few days after, but that they could not tell how long afterwards or on what day, would that have been sufficient to have destroyed a case made out by plaintiff with the deed alone? It appears to me that, as a matter pertinent to this question, some weight must be attached to the circumstance that the plaintiff has done all he could do by calling Walsh a party to the deed, and also that the defendant was the person who should have been prepared to shew that this deed was not delivered previous to the 25th of March. As a matter of law, if the plaintiff, by proof of the execution of the deed, can take the ground that he has proved delivery, not on the 1st, but previous to the 25th, and it is for defendant to shew that there is evidence rebutting that presumption, then I think it can hardly be said that the evidence of Walsh that the execution *may have been* a fortnight or a month after, or

that of Coleman that it was some weeks after the 1st, is sufficient to destroy the presumption. If plaintiff is to be taken to have, by the production of the deed, only raised a presumption of the delivery on one day, namely, the 1st of March, the day the deed bears date, and not a presumption of delivery on the 1st, or some day between that and the 25th, then that presumption probably either has been destroyed or it was left a question of fact to be determined by a verdict.

Is there not other testimony which should have been taken into consideration? Walsh says; "The quarter's rent was due on the 1st of March. *I was to receive the next quarter's rent.* Defendant *was to have the rent* till the title *passed to me.* Defendant was to become my tenant." Although in her direct evidence defendant says Walsh had not got possession and plaintiff was still her tenant at the time of distraint, on cross-examination she says Walsh was to get the rent from the 1st of March, and she does not know when the deed was delivered. This was, I think, entirely a question of fact, and everything turns on what the learned Chief Justice, who tried the cause, has found. In his decision on the trial he says; "She, (the defendant,) was entitled to distrain on the 2nd March, 1875. Whether she would have lost that right or no by executing and delivering a deed on the 1st of March to Thomas Walsh I need not enquire. The time of the delivery of the deed is not accurately ascertained. It might have been a fortnight or a month; the defendant says it was some weeks after the 1st of March, and if before the distraint it was incumbent on the plaintiff to shew it. I find a verdict, therefore, for the defendant." I submit with deference and with much doubt, especially after the opinion just delivered, whether this is quite right. Would it not have been misdirection for the learned Judge to have instructed a jury that there was nothing for them; that inasmuch as the time of the delivery of the deed is not accurately ascertained and "it was incumbent on the plaintiff to shew it," the "verdict, therefore, must be for the defendant." I submit whether he would not have been bound to have left the case to a jury,—if it had been tried with a jury,—to say whether, under the circumstances in proof, the delivery took place before or after the distraint. If before, the verdict should be for plaintiff; if after, for defendant. It was not at a

necessary to have accurately ascertained the date of delivery, and if the learned Chief Justice had found that the delivery was after the distraint, (though I confess I cannot see why defendant could not have remembered that,) the verdict could not, I think, be disturbed. He has not found whether the delivery was before or after the distraint, and I cannot, without doubt, bring my mind to see that this case can be disposed of, if it is to turn on this point, without a new trial, to have that question of fact disposed of.

If the rest of the Court had been for a new trial I could have concurred in that view.

GALLAGHER *v.* TAYLOR.

PLAINTIFF'S vessel was stranded, July 6th, on the western side of Cape George in a sudden and violent gale, and on the following morning lay on her side, exposed to all winds from the north, east and south, on a beach composed of sand and boulders, with a reef of rocks outside over which she had beaten at high water on the previous night. The master employed surveyors, who found her to be hogged and strained, with butts started, rudder unshipped, anchor and chain gone, sails and rigging damaged, and the tide flowing in and out through an injury in her bottom, the extent of which could not be ascertained, and, on their recommendation, confirmed by the judgment of the master, she was advertised on the 7th and sold on the 11th July for $200. In a few days she was repaired, and kept afloat for eighteen months, when she went on shore, uninsured, and, although she might have been got off and repaired, the owners did not think her worth the expense. It appeared that she could never be repaired so as to be tight, although she had been put on the marine slip three times for the purpose. The captain went to Antigonish, which was twenty miles distant, on July 7th, noted his protest, and telegraphed to the agents of the vessel in Halifax, who informed defendant's company, but did not give notice of abandonment. The company telegraphed to their agent at Antigonish, who on the 8th July proceeded to the wreck and examined her, and told the captain "she was a hard looking sight to try and get off." The agent promised the captain that he would communicate with the insurers by letter and telegraph, and would be present at the sale. He telegraphed, and could have been instructed by telegraph in time for the sale, but the insurers wrote instead of telegraphing, and the agent did not attend the sale.

Held, that the plaintiff was entitled to recover for a total loss without notice of abandonment.

WEATHERBE, J., dissenting.

THIS was an action on a policy of marine insurance for total loss of the schooner "Susan," lost on a trip from Guysboro to Pictou. There were a number of pleas, but the principal defence was that the loss was only partial, or at most a constructive total loss, requiring notice of abandonment. The cause was tried at Halifax, in November, 1878, before Mr. Justice JAMES, who found for plaintiff for the whole amount claimed.

The following is the verdict or judgment pronounced on the trial by Mr. Justice JAMES :—

This is an action on an underwriters' policy against a member of the Ocean Marine Insurance Company, to recover for the total loss of the schooner "Susan," insured for six months from 1st May, 1876, for $800, vessel valued at $1200. Several defences are set out in the pleas, but the only question really at issue is whether the plaintiff is entitled to recover for a total or partial loss. Although the action is for a total loss, the plaintiff may recover for a partial loss under the pleadings in this suit, and as there is no plea of tender or payment into Court, and as there was certainly a loss by the perils of the sea, the verdict must necessarily be for the plaintiff. The amount will depend upon the question whether the vessel, as she lay stranded before she was sold as a wreck, was or was not totally lost.

That the vessel when she went on shore at Cape St. George, on the 6th of July, was stranded and injured without any default of the master and crew or defect of the vessel, by sheer stress of weather, is unquestionable. She was proceeding on a voyage from Guysboro to Pictou, in ballast, and was driven on shore on the 6th of July, 1876, in the evening, and only saved from total destruction by the courage and skill of the master in beaching her, after she had lost her anchor, and was going on shore before the gale. The conduct of Captain Sullivan and the manner in which he gave his evidence, are in every respect satisfactory ; unless it be that he erred in his judgment,—beyond doubt a *bona fide* judgment,—that it was his duty, under the advice of the surveyors, and in accordance with his own opinion, to sell the vessel. I have here to remark, also, that there are no grounds, in my judgment, for imputing bad faith to any of the parties concerned in the transaction, and also that the witnesses on both sides have given their evidence in the most satisfactory manner and with surprising unanimity as to the facts, considering the time which has elapsed since the wreck.

The vessel, on the morning of the 7th of July, lay on a beach composed of sand and rocks, on the west side of Cape St. George, in the Gulf of St. Lawrence, exposed to all winds from north-north-east round by east, to south, and was in

comparative safety, unless there was a high wind from the north-east, east, south-east. or south. She had beaten over a ledge of rocks outside the sandy beach for a distance of twenty or twenty-five yards after she was abandoned by the master and crew, who landed in a boat, assisted by people on the shore. She was evidently lifted over the rocks by the rising tide, and was so far up on the beach that parties could walk round her at low tide. In this condition she was examined by the master, by the agent whom he employed, Mr. Cunningham, of Antigonish, and the three surveyors, by Mr. Whidden, of Antigonish, the agent of the underwriters, and other parties. She was found more or less hogged, her planks and butts started, rudder unshipped, anchor and part of chain gone, sails and rigging injured, and bilged to some extent, the amount of which was uncertain, as she lay broadside on the shore, and the sand had covered the part where the bilge was. It was certain, however, to all who examined her, that there was a hole in her bottom sufficient to permit the tide to ebb and flow in and out of her freely. In these circumstances the captain employed as his agent and adviser Mr. Cunningham, of Antigonish, a competent, respectable person, with whom he went to Antigonish—four hours distant—the next morning, where he noted his protest and telegraphed the owners' agents in Halifax, Messrs. Harrington & Co., and then returned to the wreck the same day,—the owners being at Isaac's Harbor and not accessible by telegraph from either Antigonish or Halifax. The agents, the same day, shewed the telegram which announced that the vessel was on shore and likely to be a total wreck, at the office of the underwriters, but did not give notice of abandonment. The Secretary of the underwriters intimated to plaintiff's agent that they would probably refer to their agent at Antigonish, and accordingly they did so the same day, Friday, July 7th. The next day, Saturday, their agent, Mr. Whidden, repaired to the cape, inspected the vessel, and returned to Antigonish, whence he wrote the defendants' Secretary the same evening. The letter would not reach the defendants' Secretary until Tuesday morning, too late to enable them to instruct Whidden to interfere to prevent the sale, which had been advertised for Tuesday morning, at a distance of four hours travel from Antigonish. Whidden was at Anti-

gonish, and no railway or line of telegraph existed between that place and Cape St. George. The captain, after he returned from Antigonish on Friday, July 7th, called a survey by three respectable and disinterested persons, and as competent as could be obtained. I think they may be called competent persons acquainted with the coast and with vessels. The surveyors, after a careful, and, as I consider, honest inspection, reported that "it would be useless to attempt repairing said schooner or getting her off, and we therefore condemn said schooner as totally unseaworthy, and recommend that said schooner be sold for the benefit of all concerned."

Two of the surveyors were examined at the trial, and, as I cannot help believing their testimony, the testimony of the master, who seems to have had no doubt whatever that the vessel was totally ruined, and also of the mate and Mr. Cunningham, I cannot help concluding that, unless the case has been materially varied by the defence, there were strong grounds for them to come to that conclusion. The vessel was an old vessel of forty-two tons burthen. She was hogged, strained and bilged, and otherwise injured in her hull, and lay on an exposed beach, and I cannot, under the plaintiff's evidence, but consider that the case is a strong one in his favor; that he has made out that reasonable and competent persons, free from interest, might have considered, and did consider that the vessel could not be got off and put in as good condition as before without incurring expense exceeding her value. There were two witnesses for the defence, Mr. Whidden and Mr. McDonald, who testified as to the condition of the vessel. Whidden differs somewhat as to the extent of damage appearing from an inspection of the vessel, but not very materially; but, in his opinion, she could be got off and repaired for $100 if the weather did not prove boisterous, and that the captain ought not to have sold her. He also considered that she could be made perfectly tight without any difficulty, but he admits that although he had had experience in shipping he was not a practical shipwright. The other witness, Donald McDonald, had been in his earlier years a practical shipwright. He agreed with Whidden's account of the damage and with his opinion. He stated that he had intended to offer to take her off and repair her hull for $150, not including anchor, chains,

sails, etc., etc., and intimates that he "supposed" she would have been as good as before, but does not give a decided opinion upon this vital point. He "thought" she was not generally strained throughout, but he admitted that a vessel might be so strained in all her joints, as, even if well repaired, to be liable to spring a leak from general looseness of her frame whenever she got in rough water. I have to remark on Whidden's evidence that his expressions and conduct at the time lead me to suspect that his opinion was not so strong at that time, when the vessel was under his inspection, as it was at the time of the trial, twenty-nine months afterwards, when his memory of the circumstances may have become somewhat dimmed by time. When he was at the cape and saw the vessel, although he knew she had been condemned by surveyors, whom he admits to be suitable persons, and was advertised for sale, he did not express any such opinion as he has now stated. As the agent of the underwriters, I think it was his duty, if he doubted the propriety of the course pursued by the master, to have given him some caution not to proceed until he had consulted his principals. I think if he had at that time held so strong an opinion he would certainly have done so. On the contrary, he told the captain, at the cape, after inspecting her, that "she was a hard looking sight to try and get her off," and he promised the captain that he would write and telegraph the company, and that he would be at the sale. He had time to telegraph the company to get their instructions, and to inform the captain of the result, and he might have got the company's answer in time to be at the sale, as he promised, and I am of opinion that he did not do so, because he had not at that time formed so strong an opinion as he has expressed at the trial. Neither he nor McDonald state that they communicated such an opinion to any third person, or even to each other. Cunningham, in his anxiety to get some price for the vessel, went round and canvassed several persons to bid for her immediately before the sale. One of them, who was one of the surveyors, after persuasion, said he would bid if they had the means, and, at the last moment, he, Cunningham, said if they would buy her he would provide the means, and on this understanding she was bid up to $200, only two persons competing. The interest of Cunningham and Graham in the

sale I do not think at all fraudulent in intention; on the contrary, but for that she would probably have sold for a few dollars. At the least the master knew nothing of their interest.

The vessel was got off within a week and repaired, at what expense we have no evidence. The defendant company, in a letter in evidence, estimate the expense at $450. It may have been more or less, and if I thought the vessel, after being repaired, was worth as much as before, I should feel myself constrained to find a verdict for defendants, notwithstanding all the circumstances I have referred to; but such is not my opinion of the evidence. Although taken to Pictou, and put on the marine railway, and although she was twice afterwards, during the remaining year and a quarter she was afloat, repaired under the same favorable circumstances, she could not be kept from leaking. It is my opinion that she was so shaken throughout by the several hours' pounding on the rocks which she had undergone, that she could never afterwards be called a sound vessel. At all events the owners who had repaired her, doubtless at much less expense than the insured could have done, say they made nothing by their bargain, but the reverse, and when she went on shore fifteen months after, although she might have been got off and repaired, her owners did not consider her worth the expense. It was for the defendants to have satisfied me on this point, but they made no attempt to do so.

I consider that the vessel, as she lay on the beach at Cape St. George before the sale, taking into consideration the risks to which she was subject, was of no value as a ship, and therefore I am of opinion that there was a total loss, and find for the amount claimed.

A rule *nisi* was granted to set this judgment aside and for a new trial, the grounds for which appear in the argument. The rule was argued March 13th, 1879, before SIR WILLIAM YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, J J.

Rigby, Q. C., in support of rule.—The only question here is whether this is a total or a partial loss, and if total, whether an actual or constructive total loss. The learned Judge finds an actual total loss, while we contend that if a total loss could be

found, it could only be a constructive total loss requiring notice of abandonment. He found there was no notice of abandonment. The authorities now shew that the condition of the vessel at the time of sale, and not the sale itself, make the total loss. She must cease to exist as a vessel. (DESBARRES, J. —Has not the position of the vessel something to do with it?) Yes; but not here, because the sale was a week after the wreck, and no effort was made by the captain, meanwhile, to get her off. If it costs more to repair the vessel than she is worth after repair, it is a total loss, not actual, but constructive, if there is notice of abandonment. Here there was no notice, and the company never accepted abandonment of the vessel. Even if there were a constructive total loss here, this finding for an actual total loss must be set aside. (WEATHERBE, J.— I would like to hear that proposition argued. YOUNG, C. J.— We are always averse to granting new trials where substantial justice has been done; a new trial is in the discretion of the Court.) Cites *1 Kay on Shipping*, 493, 495, as to what constitutes total loss; *L. R., 6 P. C. C.*, 319; *Arnould Mar. Ins.*, 878, 885, 932; *2 Parsons on Insurance*, 68, 78; *9 C. B.*, 30.

Meagher, contra.—The evidence here shews great damage to the vessel. Cites *2 Arnould Mar. Ins.*, (Ed. 1872,) 1074, citing *5 B. & C.*, 798, and *2 E. & E.*, 160. There was nothing here to warrant the captain, as a prudent man, in making any effort to get this vessel off. She was not worth what it would have cost to get her off. We contend that there was evidence to support a finding for a total loss. If, however, we are driven to a constructive total loss, there is abundant notice of abandonment in the offer of the vessel, twice repeated, from the agent of the captain and owners to the agent of the underwriters. Cites *13 Moore's P. C. C.*, 132.

Graham follows.—No precise form is requisite for a notice of abandonment; it need not be in writing; it is sufficient if it conveys an unequivocal intention to give up the vessel. We have that here between the agents of the parties, and abundant proof of the agency. The Judge's opinion in a cause, where he finds as a jury, and gives reasons for his judgment, is not necessarily to be looked into by this Court; his finding on the whole cause is to be looked at simply as a general verdict by a jury. This Court may be considered as sitting as an Appeal

Court in these cases, and as such may sustain the judgment of the Judge who tried the cause, if it was right, even if founded on wrong grounds. *Chesley* v. *Murdoch et al.*, 2 Supreme Court of Canada Reports, 48.

Rigby, Q. C., in reply.

JAMES, J., now, (January 19th, 1880,) delivered the judgment of the Court:—

This was an action on an underwriters' policy against a member of the Ocean Marine Insurance Company to recover the defendant's proportion of $800 for total loss of the schooner "Susan," insured for six months from 1st May, 1876; vessel valued at $1200. Several defences were set out in the pleas, but the only question really at issue was whether the plaintiff was entitled to recover for a total or a partial loss. A partial loss was not denied, but the plaintiff's counsel contended that the circumstances of the case were such as to constitute a constructive total loss, which was denied by the defendants' counsel. The cause was tried before me, without a jury, at Halifax, in November, 1878.

The vessel was an old schooner of forty-two tons. On the 3rd or 4th of July, 1876, she sailed from Guysboro for Pictou, in ballast, and on the 6th of July, in the evening, she was stranded on the western side of Cape George, in a sudden and violent gale, and was only saved from utter destruction, and the loss of the lives of the crew, by the courage and skill of the master in beaching her after she had lost her anchor,—those on board barely escaping with their lives. On the following morning, (July 7th,) she lay on her side on a beach composed of sand and boulders, with a reef of rocks outside of her, over which she had beaten at high water the previous night. The master employed the most competent surveyors that could be got, and upon their recommendation, confirmed as it was by the opinion of the master, whose experience in coasting vessels had been great, and whose integrity was beyond suspicion, she was advertised on Friday and sold on the following Tuesday, the greatest pains being taken to sell her to advantage, and at the sale she realized $200. In a few days she was repaired and got off by the purchasers, and kept afloat for some eighteen months afterwards.

Omitting the evidence of the actual state of the vessel at the time, which I shall hereafter consider, and some other very important circumstances to which I shall refer, there would certainly appear to be a *prima facie* case against the claim of a constructive total loss. The verdict, (which was in writing,) after discussing the evidence, was as follows; "I consider that the vessel, as she lay on the beach at Cape George before the sale, taking into consideration the risks to which she was exposed, was of no value as a ship, and therefore I am of opinion that there was a total loss, and find for the plaintiff for the amount claimed." The question now to be considered is whether this verdict shall be set aside. It is purely a question of fact. If the verdict was the just result of the evidence as a question of fact, it is good and ought to prevail, under the authorities cited for the defendant. The cause was argued last Term on a rule *nisi* to set aside the verdict. Since the argument the case has received from me a full consideration, with the result that I am still of the same opinion which I formed at the trial, in which opinion the majority of the Court concur.

A brief recapitulation of the evidence will suffice. The vessel was driven by the storm so far on the beach that a person could walk round her dry shod at low water, and outside of her was a reef of rocks. As she lay on her side she was examined by the surveyors and several other persons, and was found to be hogged and strained, butts started, rudder unshipped, anchor and chain gone, sails and rigging damaged, and the tide flowing in and out of her through an injury in her bottom, the extent of which could not be ascertained. She lay on an open shore, exposed to all winds from the north, east and south. The place was about twenty miles from Antigonish and forty from Pictou, which was the nearest port at which a tug boat could be obtained. There was a small settlement near the place, but no seaport nor any facilities for landing or repairing a stranded vessel nearer than Pictou; no railway nearer than Pictou; no telegraph nearer than Antigonish. The captain, after examining the vessel next morning, and taking such advice as he could get on the spot, went to Antigonish, where he noted his protest and telegraphed to the vessel's agents in Halifax, who at once informed the defendants'

company, but did not give notice of abandonment. The company telegraphed to their agent at Antigonish, Mr. Whidden, who, on the 8th of July, proceeded to the wreck and examined her. He knew she had been examined by the surveyors, saw the advertisement of the sale. He also conversed with the captain, and abstained from cautioning him that the vessel ought not to be sold. He and another witness, McDonald, while not differing very materially from the five witnesses for plaintiff as to the facts, expressed an opinion at the trial that she could have been got off for a small sum and rendered perfectly tight, but, at the time, he expressed to the master no such opinion as I think he, as the agent of the underwriters, ought to have done if he thought he was about to do wrong. On the contrary, he told the captain, after he had inspected her, that "she was a hard-looking sight to try and get her off." It is my opinion, from the evidence, that Whidden, at that time, some three years before he gave his evidence, had not a strong opinion that she could be got off successfully, and that what he said at the time was calculated to encourage the master to proceed with the sale. He promised Captain Sullivan to communicate with the insurers by letter and telegraph, and that he would be at the sale. He telegraphed to them from Antigonish, and if they had answered by telegraph instead of by letter, Whidden could have been at the sale with their instructions. As it was, the master expected him, and waited for him at the sale.

Apart from the other evidence, I consider that the conduct of the insurers under the circumstances, in neglecting to advise the master when their agent had virtually undertaken that they would do so, and had encouraged him to proceed with the sale by promising to be present, was a very material circumstance for the consideration of a jury. It appears to me that he had a right, under the circumstances, to assume that they agreed with him in his opinion as to the state of the vessel, and were satisfied that the sale should be held; and my opinion at the trial was, and still is, largely influenced by these facts. The vessel was, it is true, got off at a moderate expense, repaired and re-fitted, at what cost we are not informed, and was run for some time afterwards, but she could never be repaired so as to be tight, although she was put on the marine

County, adjoining the County of Guysborough where the owner resided, Antigonish and Halifax, where the owner's agents who effected the insurance did business, being connected by telegraph. The vessel, valued at $1200 and insured for $800, was got off without much difficulty, and was, by instructions from the master, sold for $105, and repaired, at what expense we are not informed, though the *onus* was on plaintiff, and was afterwards used in "trading" and carrying passengers. It is difficult except by statements and opinions of the most general character, to ascertain what really was the injury which the vessel had sustained. The most that can be said in favor of the plaintiff is that the vessel was so injured that she was not fit to be repaired, and that a prudent owner would have sold her as she stood, because it would cost more to repair her than she would be worth when repaired; and upon this my brother JAMES, before whom the cause was tried without a jury, has gone in giving the plaintiff a verdict as for a total loss, although there was no notice of abandonment. I submit with deference that this verdict is wrong, and should have contented myself with a very brief statement of my reasons, were I not so unfortunate as to hold an entirely different opinion from that of the other members of the Court.

This at most is a "constructive total loss," and whatever difficulties have surrounded the question of abandonment, I thought the case very clear with these facts. This vessel was sold in a home port, and took the sea again as a sea-going vessel, on which the lives of passengers were entrusted by her new owner. She was not utterly lost by sinking in the sea, and not entirely destroyed by being broken to pieces on the shore. She undoubtedly survived the disaster in specie, and all that can be contended, and all that was contended with the slightest show of argument or authority, I suppose, was that the owner or his master or agent was at liberty to elect whether he would repair or abandon. He was not bound to repair, according to the fact as found by the learned Judge, but he was bound to elect within a reasonable time and give notice of abandonment, which would have had the effect of transferring all that remained to the underwriters. Then, upon this verdict, he could have claimed for a total loss, as if the vessel had been torn asunder and ground into small frag-

ments, or entirely submerged in the most inaccessible part of the ocean.

It must be admitted, I think, that there are statements in the text books and reported decisions which, upon their face, would seem to support the contention of the plaintiffs at the bar. *Arnould* says, page 1002, it "is a clear case of absolute loss on ship * * * where, though her hull may hold together, yet the ship *as a ship* is destroyed and subsists only as a wreck; nor is any notice of abandonment requisite in such cases to entitle the assured to claim a total loss." And to support this exposition of the law, he cites the case of *Cambridge* v. *Anderton*. The learned Judge who tried the cause now under consideration took time to consider authorities to be submitted by counsel, and on the argument the passage quoted from *Arnould* and *Cambridge* v. *Anderton* were cited to us; and the learned Judge I observe has decided at *nisi prius* in the very terms of *Arnould* and Lord Chief Justice ABBOTT, before whom the case was tried, and who afterwards gave judgment sustaining the verdict, *1 C. & P.*, 214. The ship in that case, with a cargo, sailed from Quebec in July, 1823, and got on the rocks in the St. Lawrence. The master went to Quebec and agreed with Lloyd's agent on surveyors who reported that it would take less to build a new ship than to make this one sea-worthy. She was sold to shipwrights who got her off, and, after repairs at Quebec, sent her on a voyage to England, when she was lost on Prince Edward Island. There as here there was no notice of abandonment. The jury were instructed that if they thought the ship was utterly useless as a ship after she struck and could never be made useful but at an expense equal to her value, there was a total loss with benefit of salvage though the form of a ship remained. Here is the headnote of the report of that case in *2 B. & C.*, 690; "Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment." The point was distinctly taken on the argument that the owner should have given notice of abandonment to indicate his election, and ABBOTT, C. J., said, in refusing a new trial; "Whether the ship was repairable or not was left as a

question to the jury, and I think that they disposed of it correctly. If the subject matter of insurance remained a ship it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck; the name which you may think fit to apply to it cannot alter the nature of the thing." BAYLEY, J., said, "I take the legal principle to be this; if by means of any of the perils insured against the ship ceases to retain that character and becomes a wreck that is a total loss, and the master may sell her, and the assured may recover for a total loss *without giving any notice of abandonment.* This was decided in *Read* v. *Bonham*, 3 B. & B., 147." And HOLROYD, J., said, "where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment." This may seem like authority for sustaining this verdict, and I do not understand that this case, although often and much discussed, has been overruled.

I cannot help observing that this case of *Cambridge* v. *Anderton* and the comment of *Arnould* founded thereon, have caused much misunderstanding to those intent upon anything short of the patient investigation, not only of the cases but of the reasons on which the cases are founded. A general rule has been recognized very distinctly before and since the decision in *Cambridge* v. *Anderton*, respecting circumstances which call for notice of abandonment. When the thing insured or a part of it subsists, or where there is any hope of its recovery,—wherever there is anything to transfer to the underwriter, a notice of abandonment is necessary to justify a claim for total loss. When the thing insured is absolutely destroyed, so that nothing whatever remains which a reasonable man would avail himself of, then a notice is not necessary. This, it may be said, though it would preclude the plaintiff in this case from recovering, would also have precluded the plaintiff in a case coming within the rule in *Arnould*, supported by cases similar to *Cambridge* v. *Anderton*. I am of opinion, however, that if a case like the latter could occur again, the plaintiff would recover, and that it is law at this day. I submit that that case as well as others of a similar character are exceptions to the rule. I have observed nothing in the reports of that case to indicate that *the news of the loss, and the necessary sale of*

the ship, both reached the owner at the same time, but that, evidently, was a material element which distinguished the case. I take this to be so from a remark of one of the learned Judges who decided the case. *Read* v. *Bonham*, cited by Mr. Justice BAYLEY, was a claim for insurance for £8000 on ship and £4000 on freight, from London to the East Indies and back. After sailing from Calcutta she put back damaged. Notice of abandonment was given to Lloyd's agent there who denied authority to receive such notice. A survey shewed that £5000 would be required for repairs which the agent refused to undertake, and, after attempting to borrow in vain, he sold the ship for £1200. In an action on the policy on the ship, the jury found that the master had sold for justifiable cause, and the Court refused to grant a new trial. The notice of abandonment to Lloyd's agent appears to have been held insufficient, and DALLAS, C. J., in giving judgment, says; "Here there is no evidence of any communication to the owner of the circumstances of the loss previously to the arrival of the captain."

There was another leading case where the necessity of a sale without the possibility of communicating with the owner, entered as a material element into the decision,—*Idle* v. *The Royal Ex. Ass. Co.*, 8 Taunt., 775. This was a case of insurance on freight and on the cargo, from Quebec to London. On the voyage the ship sprung a leak and ran aground on a reef at Kamouraska, and was in imminent danger of being carried away and destroyed. The vessel was sold by advice of a surveyor,—the captain being part-owner,—in this dangerous condition. She afterwards survived the winter, was saved, repaired, and brought a cargo to London. It was found by the jury that the master acted *bona fide* for all concerned. *The plaintiff, however, had no intimation of the loss till after the sale had taken place,* and gave no formal notice of abandonment. DALLAS, C. J., in delivering the judgment of the Court, said; "Inasmuch as there could be no *freight to abandon, no actual benefit could be derived from abandonment in terms,* and the chief objection is that something has not been done, which, if it had been done, could have placed the insurer in no better position." He was careful to point out that the opinion of the Court should be considered as

founded on the peculiar facts of the case, and that though general principles are valuable, from the very nature of subjects of this description their application must depend upon the circumstances of the particular case. The language of Lord ELLENBOROUGH was cited as applicable, viz.; "There is not any case which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment." The case came before the King's Bench in error, and a *venire de novo* was awarded, because the special verdict did not find that a sale was necessary. BAYLEY, J., said the question whether the circumstances amounted to an abandonment might also be left open. The case was settled; see note in 3 Brod. & B., 656.

Cambridge v. *Anderton* was decided in 1824, and *Read* v. *Bonham*, upon which it was supported, in 1821. Previous to this the law was well settled. Where a ship met with disaster, (*Martin* v. *Crockatt*, 14 East., 465,) which required very expensive repairs, the facts were stated to the underwriter without a formal notice of abandonment,—which also is an answer to any contention of sufficiency of notice. The underwriters declining, as in this case, to interfere, the ship was sold. Lord ELLENBOROUGH pronounced his opinion that *as the thing existed in specie an abandonment was necessary to enable the underwriters to elect whether they would incur the expense of repair.*

In *Gernon* v. *Royal Ex. Assurance*, decided in 1815, a cargo of sugar was damaged by sea water. The ship was on a voyage from Liverpool to Calais, and put back to Liverpool. The sugar if sound was worth £9,200 and it netted £6,047. Notice of abandonment had been given. GIBBS, C. J., directed the jury that the assured were not justified in abandoning, unless the property was so injured that it could not be applied to the original purposes of the voyage. It was in evidence that no part was in a merchantable state. The trial is reported in *Holt's R.*, 50. There was a verdict for plaintiff which the Court refused to disturb, (see *6 Taunt.*, 383,) because, since the goods were not in a condition to be forwarded, there was no ground for saying that the assured were not entitled to abandon.

In 1816 *Bell* v. *Nixon* (Holt, 423,) was decided. A vessel was driven into port where there was no dock to receive her. She had suffered so much by sea perils that on a survey it was found necessary to break her up and sell her for old timber. DALLAS, J., on the trial, said; "the ship is proved to have been in that condition that it was necessary to have a survey. * * * * The arguments on which this ship is represented to be a wreck proceed upon a fallacy. She was not a wreck. Her timbers were together. She existed as a ship, specifically, both when she was surveyed and when she was sold, and it is not because there was no dock at Limerick to receive her, and because she is found to contain rotten timber upon breaking up, that she is to be represented as a wreck. If her planks and apparel had been scattered in the sea it would have been another question." He also said; "The assured has a right to abandon under certain circumstances, and in some cases he may claim a total loss without abandonment. But if the case be doubtful the assured ought not to take upon himself to determine for the underwriters." This case was afterwards moved, and the Court were of opinion unanimously that an abandonment was necessary. Mr. Phillips, *(2 Phillips on Insurance,* 234,) commenting on this case says that "the formal abandonment of a ship that has been broken up and the pieces sold as mere materials for fuel, seems about as idle a ceremony as can be well conceived;" and *Arnould* in criticizing this, says; "But the decision seems correct in principle, when the circumstances of the case are attended to. The ship remained a ship till broken up by the assured; her destruction as a ship was therefore not immediately caused by the perils insured against. It was the work not of the winds and waves but of the assured himself, who ought by notice of abandonment, to have given the underwriters the option of taking the ship as she stood before being broken up, and making what they could of her."

After the decision in *Cambridge* v. *Anderton*, in 1827, *Mount* v. *Harrison* was decided; (see *4 Bing.*, 388.) The ship was wrecked in a storm at the Cape of Good Hope, and on the recommendation of experienced persons was sold, and her cargo forwarded to England by another ship. After several unsuccessful attempts the wrecked vessel was got off

in three months, and, after repairs, performed many voyages. The jury found that the captain was justified in selling the ship, and a motion for new trial was claimed on the authority of *Parmeter* v. *Todhunter*, 1 Camp., 541, where Lord ELLENBOROUGH held that in insurance on *freight* the insured could not recover for total loss without notice of abandonment if the goods were in existence, though both ship and cargo were sold. PARK, J., (the Court refusing a new trial,) said the case of *Idle* v. *Royal Ex. Ass. Co.* was only met by the *nisi prius* case of *Parmeter* v. *Todhunter*, and GIBBS, C. J., when that case was cited had said that he could not understand what was to be abandoned. BURROUGH, J., commenting on *Idle* v. *Royal Ex. Ass. Co.*, thought "that there was *nothing to abandon* in an insurance on freight;" and GASELEE, J., said there was nothing to abandon, *for* the goods were immediately put on board another ship, and the *underwriters could have gained nothing had an abandonment been made.*

Then came in 1828 *Holdsworth* v. *Wise*, 7 B. & C., 795. The ship was deserted at sea by the crew acting *bona fide* to save their lives. She was afterwards rescued, repaired, and sent to England. Notice of abandonment had been given before the owners had tidings of the ship's safety. This was held sufficient to support a claim for total loss by BAYLEY, J., who said; "If the subject matter of insurance ultimately exists in specie so as to be capable to be restored to the hands of the assured, there cannot be a total loss unless there has been an abandonment." He also remarked that there were cases which showed that the mere existence of a ship after a total loss and abandonment would not reduce it to a case of partial loss. * * * "The ship must be *in esse* in this kingdom, under such circumstances that the assured may if they please have possession, and may reasonably be expected to take it. Here such circumstances do not exist."

The well known case of *Roux* v. *Salvador* (1 Bing N.C., 526,) was decided in 1835. The claim was for insurance on salted hides from Valparaiso to Bordeaux. They were in a state of incipient putridity by reason of a leak in the ship at Rio Janeiro, and sold for one fourth of their value. There was no notice of abandonment. On the argument in the Common Pleas it was conceded by plaintiff that if there had been any *spes*

recuperandi abandonment would have been necessary, but, inasmuch as the news of the damage and the sale were received by the assured at the same time, it was contended that *there was nothing of which the underwriter could avail himself to abandon.* Lord Chief Justice TINDAL, who delivered judgment for defendant on the ground that notice was necessary, went upon the doctrine that where any part of the thing insured remained in specie, a notice of abandonment could not be dispensed with, and that the hides having been sold as hides rendered the notice necessary. The opinion of Lord ABINGER in the Exchequer Court, over-ruling the judgment of the Common Pleas, has been said to have covered this subject with a flood of learning, and it has often been cited without avail in support of the view urged by plaintiff here. Those who wish to understand the subject will mark well what Lord ABINGER says; "If a prudent man not insured, would decline any further expense, * * * a party insured, may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may if he pleases, take measures at his own cost for realizing or increasing that value." And he quotes with approval the language of Lord ELLENBOROUGH in *Mellish* v. *Andrews*, 15 East., 13, that it is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of recovery, there must be an abandonment. He puts the cases before him on the ground of absolute total loss, and not a constructive loss of the hides. By the process of fermentation and putrifaction, a total destruction of them before their arrival at the port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated, he says, they became a salvage for the benefit of the party who was to sustain the loss, and the facts of the loss and the sale were

made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. "It appears to us, therefore, that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods. They could never arrive, and at the same moment when the intelligence of the loss arrived, all speculation was at an end." The argument had been used for the underwriters that the money produced at the sale of the hides in specie became vested in the assured, and this would be inconsistent with the undoubted doctrine, that assurance is a contract of indemnity only. Lord ABINGER meets this argument in this way; "The assured certainly has always an option to claim or not, but his abstaining from his right does not alter the nature of it, and if it be true that the proceeds of the sale vested in him, they would equally have done so if, instead of being sold in specie, the hides had actually changed their form and been sold as glue, or manure, or ashes."

In 1850 *Knight* v. *Faith* was decided, reported in *15 Q. B.*, 649. A ship was insured for £1000, for a year ending September 23rd, was stranded, got off and brought into the harbor of St. Croix on September 16th. She remained till the middle of October, during which time she was pumped, and her cargo discharged into other vessels. The necessary repairs could not be made at Santa Cruz, nor could she be taken to a port where she could be prudently repaired. In October she was sold by the master, who was part owner, for for £72. No notice of abandonment was given. These facts were stated in a special case, in which it was admitted that the ship received her death blow when stranded on the 16th September, but the damage was not discovered till the 24th of that month. Lord Chief Justice CAMPBELL who gave judgment, rejected the "death blow" theory of total loss, stating that the Court could not give "such weight to this metaphorical expression." He says; "We still find her surviving as a ship with her crew on board, several weeks after the risk had expired, and slight repairs might have been sufficient again to fit her for navigation." Respecting the question of notice of abandonment, he says; "Where she is reduced to a mere wreck, the solution of this question may be clear enough.

she still retains her character of a ship, it may be
ed with difficulty, but here we are of opinion * * *
ıe sale is not shewn to be lawful. * * * She remained
character of a ship capable of being repaired if there
en the means of repairing her at Santa Cruz, and she
have been sent to other places where she might have
epaired, *although not prudently.*" Then he asks this
ɔn; "Could William Ware, the master, who is a part
one of the assured and a plaintiff, under these circum-
ɜ sell the ship, and without notice of abandonment
the insurers liable for a total loss?" He pronounces
narks of Mr. Justice RICHARDSON, dissenting in *Read* v.
m, strongly applicable. "This we think is not an
total loss, and if a constructive total loss the insurers
ly be rendered liable for the sum insured by a notice of
ɔnment. If the subject matter remains in specie, though
ımaged state, a notice of abandonment is necessary to
the insured to make a claim as if it had been actually
yed." Lord CAMPBELL observes that *Cambridge* v.
ton and *Roux* v. *Salvador* do not lay down any such
ıe as that, upon damage being sustained by perils of the
otice of abandonment is as little necessary where the
constructive as where it is actual by the destruction of
bject matter insured. In *Cambridge* v. *Anderton* he
out that though the ship was repaired so as again
ntly to traverse the ocean," the decision proceeded on
pposition that the insured vessel had ceased to be a ship
ɔh as if her timbers and her masts had been scattered
the beach; and he adds this comment; "Had the Judges
supposed that the ship insured, after the misfortune
befell her might have been sent to a distant port and
ɐd, *either prudently or imprudently*, they would probably
ıeld in accordance with all prior decisions that a notice
ndonment was indispensably necessary." "I am bound,"
s, "to suppose that *Roux* v. *Salvador* was well decided
Exchequer Chamber, although I must confess that till
d that decision I was rather at a loss to understand how
ısoning of Lord Chief Justice TINDAL was to be answered,
ɔg that the hides insured were still hides where they
ıold." He remarks that Lord ABINGER proceeds upon

the ground that the subject matter insured was virtually destroyed, and says; "He puts the very case upon which we have to decide, namely, that there may be a peril which renders a ship unnavigable, where, if a prudent man would decline further expense, yet, as the thing insured or a portion of it still exists and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it before demanding the full sum insured." This is very great authority against the view urged in behalf of the plaintiff Gallagher, and is much relied on by underwriters, but it will be seen that the question of notice of abandonment does not seem to have been a material question in this case, inasmuch as the Court decided there was only a partial loss. It has frequently been urged at the bar that this case is in conflict with Lord ABINGER'S opinion in *Roux* v. *Salvador*.

I may stop to remark that so great an authority as Chief Justice SHAW, in commenting on the judgment of TINDAL, C. J., in *Roux* v. *Salvador*, before it was reversed, declared it well supported in principle as by authorities. Lord CAMPBELL had, I think, been counsel for defendant in that case, and I cannot refrain here from citing from a recently reported opinion a few words touching the history of *Knight* v. *Faith*. Mr. Justice BLACKBURN, in delivering judgment in the case of *Rankin* v. *Potter*, L. R., 6 H. L., 83, decided in the House of Lords, said that Lord ABINGER'S opinion in the case of *Roux* v. *Salvador* was received with general approbation at the time, by every one except Lord CAMPBELL, who never could be brought to think it right. He says of *Knight* v. *Faith*; "The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it, the Court came to the conclusion, as stated in the judgment, that slight repairs might have been sufficient to fit the ship for navigation, and the Court said that, though the ship was sold, they were of opinion that, as against the insurers, the sale was not shewn to be lawful. On such facts, the assured could never have recovered on a total loss, even if he had delivered all possible notices of abandonment from the first to the last. Yet the Court forced the counsel to amend the case by inserting a statement that

no notice of abandonment was given, and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the pupose of recording dissent from the decision of the Exchequer Chamber in *Roux* v. *Salvador*. It should in candor, however, be added that the other Judges of the Court joined Lord CAMPBELL in this. Still. I think that the fact that a judgment was not necessary for the decision of the case before the Court always diminishes its authority, and I think that, on perusing the judgment in *Knight* v. *Faith*, it will be found that no argument is produced which had not been used in *Roux* v. *Salvador*, and that no new authority is cited except Lord CAMPBELL'S own opinion in *Fleming* v. *Smith*, and a passage from the judgment of Lord Chancellor COTTENHAM in *Stewart* v. *The Greenock Marine Assurance*." CLEASBY, B., who delivered an opinion, dissenting from that of BLACKBURN, J., says that *Knight* v. *Faith* corrected errors respecting abandonment which had been gaining ground. On the argument of the case before us, a construction of the law was urged, the effect of which would dispense, it seems to me, with notice of abandonment altogether, and I cannot help thinking that a mistaken opinion has prevailed, which has extended to shipowners, and which, uncorrected, may work ill results in a maritime province like Nova Scotia, whose ships are found in every port on the globe. Whatever may be the merits of the opinion of the Court in *Knight* v. *Faith*, the words of Lord Chief Justice CAMPBELL on this point, are worthy of careful attention; "We have deemed it expedient to refer to these authorities, as we have reason to believe that a notion has been entertained in the profession since the decision of *Cambridge* v. *Anderton*, that wherever a ship insured becomes unnavigable and cannot be prudently repaired, the assured may recover for a total loss without notice of abandoment. In the case of *Fleming* v. *Smith* we are told very confidently in the House of Lords by the counsel for the assured that abandonment in cases of constructive loss was an exploded doctrine, and that there is no difference between a notice of abandonment and the cession of a salvage on receiving payment of the sum insured. Some pains were then taken in giving the judgment of the House to vindicate the ancient principles of insurance law. But, subsequently, in *Stewart* v.

Greenock Marine Insurance Company, the supposed new fashion was again asserted to prevail in Westminster Hall. It met, however, with no countenance from Lord Chancellor COTTENHAM, who said, (p. 183,); 'In all cases in which the subject is not actually annihilated the assured is entitled to claim, *and claiming as upon a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it.*'"

It must be apparent from some of the cases in the books how important, in dealing with the case now considered in the light of the authorities cited, is the element of distance and inaccessibility. Arnould, in his work, (p. 1019,) clearly draws a distinction, and in commenting on a reported case, (p. 1013,) declares it a direct authority that where a vessel *abroad*, damaged so as no longer to be fit for use as a ship is sold, no notice of abandonment need be given, and Parsons, (vol. 2, p. 917,) says that; "An injury received *abroad* to a ship may be irreparable, which would not be so if received in her *home port*. To this extent it may be true that the same sea damage which would amount to actual loss of the ship, if sustained while she were at a distance from home, might not have this effect if she were then at home." And BRETT, J., in the case of *Kaltenbach* v. *McKenzie*, reported in the Law Journal, and to be noticed directly, says the telegraph, if known to be in use between Singapore and London, should have been resorted to in giving notice. In *Potter* v. *Rankin*, it was said that now, when by means of the electric telegraph the underwriters can promptly send orders to the spot where the ship is in peril, a notice of abandonment may be of great practical importance, and a distinction grounded on inacessibility was not unknown long before the telegraph, as this passage from Valin will shew;— "The assured on ship has a clear right to abandon if in the place where the ship goes ashore, or in its neighbourhood, there are neither materials nor workmen for repairs."

However conflicting the arguments in the cases cited may appear, it must be quite apparent on a close examination of them that there is nothing whatever in any of them to support the contention here that a notice of abandonment can be dispensed with in a case like this, where the vessel was stranded in a home port, and there was ample time and opportunity to

give notice. No authority was cited and no argument advanced to shew that plaintiff could recover on the ground of sufficiency of notice, and no authority was offered to shew that notice was waived. In fact, the contention of the underwriters was that there was only a partial loss, and their agent wrote a letter to that effect, which is in evidence, and for defendants it was strenuously urged before us that this was only a partial loss. On that point, as I need not, holding the views I do, offer an opinion, I will refrain from doing so.

There are two recent cases already mentioned which were not cited to us, in both of which the question involved here was disposed of so unmistakably as to have dispensed with the trouble I have taken, if I had noticed them earlier. In *Potter* v. *Rankin*, decided in the House of Lords, L. R., 6 H. L., 83, the main question to be considered was abandonment and notice, and we have altogether in the different Courts in that case the opinions of no less than eighteen eminent Judges, occupying with brief reports of the argument upwards of one hundred and thirty pages of the Law Reports. It may at least be useful to complete the collection of authorities on the subject by brief extracts. A ship was chartered to M., after discharging at New Zealand, to sail for Calcutta, thence to bring a specified cargo to England at a stipulated freight. The owners effected a policy on this freight. After damage and long delay in New Zealand, and partial repairs there, the ship arrived at Calcutta, where full examination could be had. It was found that the necessary repairs would exceed the value of the vessel when repaired. The House of Lords, confirming the decision of the Exchequer Chamber, which had reversed a previous judgment of the Court of Common Pleas, did so upon the ground that, because there was nothing to abandon, no notice of abandonment was necessary. In the Exchequer Chamber Lord Chief Justice COCKBURN says the rule requiring notice of abandonment "attaches only where there is something of appreciable value, however small that value may be, to relinquish to the insurer." * * * "But where the interest to be made over to the insurer is of so shadowy and unsubstantial a character that it cannot be supposed that it could have been of any benefit whatever to the underwriters, or that the latter, as reasonable men, would have thought of availing

themselves of it, so that for all practical purposes abandonment would have been a merely idle and useless formality, the assured ought not, in my opinion, be tied down to the necessity of giving notice of it, especially in these times, when it is notorious that the practice of underwriters is never to accept the notice," and LUSH, J., says; "If there was nothing of the subject of insurance to abandon, the defendants position would have been neither better nor worse than if the ship had sunk or gone to pieces at Bluff Harbor. He could not in that case have complained that notice of the loss had not been given him."

In replying to questions submitted by the House of Lords BRETT, J., says; "It may, however, be that * * * where there is anything to abandon, the caution of great merchants and lawyers has by usage engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given and given quickly, both in order to signify the election of the assured and to give the underwriters opportunity for inquiry and action, but that where there is nothing left to abandon, notice of abandonment, being futile, is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to that end to prevent the assured from having at the same time payment in full of the sum insured, and the thing insured, a thing of value in his hands. * * * * It seems to me to be a proposition without foundation of reason to say that there must be an abandonment where there is nothing to abandon. If the case of *Knight* v. *Faith* decided the contrary, I, with deference, think it is a wrong decision. * * * * I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary and no notice of abandoment is required where there is nothing to abandon which can pass to or be of value to the underwriter." And MELLOR, J., said; "The ground upon which a notice of abandonment is held not to be necessary where a ship founders at sea and an actual loss takes place, is that there is nothing left which the assured can cede to the underwriters or by which their position can be affected." BLACKBURN, J.; "When the party indemnified has a right to indemnity, and has elected to enforce his claim, the chance of

any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration are transferred from the party indemnified to those who indemnify, and therefore if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from farther deterioration, such steps, from the moment of the election, concern the party indemnifying. * * * * The true principle is that notice of abandonment is only requisite when, from the state of facts, *it may make a difference* to the underwriters if the assured delays making his election whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss." BRAMWELL, B.; "But the ship, though so injured, remained a ship, and could have been repaired so as to earn the freight, though at a loss. The loss of the ship, therefore, though total, was what is called constructive, perhaps an unfortunate expression, but one for which I know no substitute. It was actually a total loss, the materials of the ship remaining in the form of a ship. In such a case, if the materials cannot be kept together as a ship, at an expense less than their value as a ship when so kept, *plus* their value as materials not so kept together, the vessel is totally lost, or rather the loss of the vessel is total, that is respecting freight. * * * The damage or loss to a ship may be absolutely or necessarily total, as where it is burned or sunk to a hopeless depth. It may also be total where it remains in specie afloat or ashore. In that case it is so or not at the option of the assured. He may, if he thinks fit, treat the loss as partial and repair the ship. It is obvious that, except in cases of valued policies, the question is comparatively unimportant. In the case of a valued policy the question may be much more important. But in both sorts of policies, where the ship remains in specie, afloat or ashore, though the loss is really total, though the ship is materially lost as a ship, and what remains are only the materials of a ship fastened together in the form of a ship, the option is with the assured to keep his ship or his salvage and claim for a partial loss, or to claim for a total loss, giving up his interest in the ship or its materials to the underwriters. This is abandonment; it always supposes there is something to abandon, something to cede. If the ship is burned, or sunk to a

hopeless depth, there is nothing to abandon. So if it is dashed to pieces on the shore, there is no ship to abandon. By the destruction of the ship the loss of the ship is total, and the pieces, as a consequence, belong to the underwriters. What would be the law in the supposable case of the ship being re-built of the old materials, to whom it would belong, and what consequences would follow as to other matters, it is not necessary to consider."

Lord HATHERLY repudiated the inference sought to be drawn from some *dicta* of Lord CAMPBELL that it was necessary in all cases whatsoever of claims for total loss to give notice of abandonment, and he said; "If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed, (though that is, perhaps, not a very happy phrase,) occasioned by the impossibility of effecting repairs, the cost of which will exceed the whole value of the ship when repaired, then there being something *in esse* to be handed over to the underwriters. It is necessary that they should be informed of this, in order that they may have an opportunity of making the best use they can of what remains—of that which the owners give up in electing to make that a total loss which is not, in fact, a total loss, there being something in the nature of salvage, or fragments of wreck, or something of that kind, which may be of value to the underwriters, although not of any to the owners.

In *Kaltenbach* v. *Mackenzie*, 38 L. T., 942, Lord COLERIDGE had non-suited the plaintiff for want of notice of abandonment, and on the argument of the rule *nisi* for a new trial, it was urged that the leakage was at the rate of two-and-a-half inches per hour; that the evidence of Lloyds' agent was that there was no skilled labor to be had, and no dock at Saigon, where the vessel was; that he would not have sailed her; that she was broken all to pieces like a biscuit, and that there would have been risk to the lives of those on board to have towed her to Singapore with her back broken. GROVE, DENMAN and LOPES, J J., were all of opinion that there should be a new trial. GROVE, J., said; "I do not think it necessary or desirable to say more than that the facts shew more than a scintilla of evidence upon which the jury might have found for plaintiff." On appeal this judgment was reversed; *39 L. T.*, 217. Lord

Justice BRETT there said; "For instance, if the owner hears hat his vessel is damaged, that is not sufficient information. He must know the nature of the damage. If he hears that his ship is captured in the time of war, then it is obviously a otal loss. If he hears that his ship is stranded, with her ottom out, and her back broken, yet still is in existence, but s in such a state that any reasonable man must know that he is in imminent danger of being utterly lost, then he must t once give notice of abandonment. When he hears that the amage is such as to cause imminent danger of total loss, then e must give notice of abandonment. * * * * I will not ay that if it could be shewn that the subject matter was in uch a condition that it would disappear before notice of bandonment could be given, the assured might not be excused rom giving notice, *but I say that nothing short of that would xcuse him.*"

Further comments on my part are, I imagine, not required. know of no decided case, and none can be found, early or ecent, upon which the finding of the learned Judge who tried his cause can be supported, and the authorities appear to me ndisputably to require very much more indeed to be made ut than was pretended on plaintiff's part to dispense with otice of abandonment in claiming for total loss, and to sustain his verdict.

THE QUEEN *v.* CARTER.

In an action on a *certiorari* bond, under chapter 75, Revised Statutes, "Of Licenses," chedule E, the defendant obtained an order *nisi* for the endorsation on the writ of the name f a person to be liable for costs, under the practice established by *The Queen* v. *McKercher*, R. & C., 337. Before the rule was made absolute, the plaintiff endorsed the name of the Clerk of icense, and gave the defendant notice. A rule was afterwards obtained making the rule *nisi* bsolute and giving the defendant ten days to plead. Plaintiff, after the rule was made bsolute, endorsed the name of the Clerk of License a second time, but did not give the defendant otice of the second endorsation, and, after the expiration of ten days, marked a default for want of a plea.

Held, that the default had been regularly marked.

Q. As to the practice established by *The Queen* v. *McKercher*, 3 R. & C., 337.

THIS was an action brought on a certiorari bond, tried in he County Court at Truro. A rule was taken out to stay roceedings until a relator was appointed, which was made bsolute and served afterward on the plaintiff's attorney.

Before the rule was made absolute plaintiff's attorney endorsed the name of the Clerk of License as relator, and after the making absolute of the rule, he again endorsed the same name on the writ, but gave no notice to defendant of the second endorsation. The rule absolute was served on the 7th February, the name endorsed the second time on the 8th, and the default marked on the 19th. Under the rule the defendant had ten days after the endorsement of the name of the relator to plead. The ten days had expired, but the defendant was not aware of the second endorsement being made, having had no notice of it, although he had notice of the first endorsement.

A rule was taken out to set aside the default. The Judge who heard the motion considered that the defendant had all the notice that was necessary and discharged the rule. This decision was appealed from.

Gourley for appellant.—The ground on which the Judge proceeded was that the name of a relator was endorsed previously to the service of the rule, which was understood to be a stay of proceedings. The name was given before the rule for the relator was made returnable. (WEATHERBE, J.—The rule is not for a stay of proceedings, but to place the name of a person on the writ who shall be responsible for costs. RITCHIE, E. J.—You don't require an order of the Court to put it on if it is placed there without it. Whenever the Queen's name is used you have a right to demand the name of a relator. The moment it is given you have attained your object. I do not understand that there is any such thing in the case as regularity or irregularity. The attorney might have given the name in Court, and at that moment your motion would have been at end.) The only authority I had to hold the Clerk of the License was the name being endorsed after the service of the rule. The marking of the default was not in good faith. (YOUNG, C. J.—It was merely strict practice. WEATHERBE, J.—The name might have been placed on the writ before it was issued, but I don't see how it could be placed there subsequently without an order of the Court. RITCHIE, E. J.—It does not require to be marked on the writ. It need only be communicated.) The Court gave me a rule saying that I had ten days from the endorsation under this rule. Suppose they allowed it to remain for six months, and

marked it behind my back, and then, after waiting for ten days marked their default. If I have a right against any party it is under this rule. The rule having passed the Court we are bound by it.

Henry contra.—I will eliminate the question as to the law in regard to compelling the endorsement of the name of a relator, and for the sake of argument admit that it can be compelled, though I do not think it can be compelled in a case of this character. The rule *nisi* may be considered in two aspects. It is, in the first place, an order for the doing of a thing which is to be a compliance with it, and if there is a stay of proceedings at all it is only until that act is done. The only grammatical construction of the rule, however, is that there should be a stay of proceedings after it was made absolute. In the first aspect the endorsement being made, the rule *nisi* makes no provision for notice, and the same is true of the rule absolute. In the first case the judgment is regular. I think that the first endorsement was a compliance with the requirement of the rule, and the defendant could have been bound by notice without the second endorsement being made. The fact was that he had written notice of the first endorsement. (WEATHERBE, J.—That is not denied, but it was no notice of the second.) There was no necessity for notice of the second, and, in fact, there was no endorsement. The rule provides for something that was done already, and it must be assumed that the Judge, when he granted the order, was not aware of it. The plaintiff's attorney was justified in putting on the endorsement under the rule *nisi*, and the sooner he put it on the better he complied with the rule. The minute he put the name on, the stay of proceedings was suspended. Suppose there was no stay of proceedings, as soon as the notice was given the time would begin to run. There is not a single syllable in the practice books in reference to notice in cases of this sort. (WEATHERBE, J.—The proceeding is a novel one and may be governed by analagous cases.) There was nothing in the rule to require notice. (WEATHERBE, J.—The rule complies with the rule in *Queen* v. *McKarcher.*) This question may not have arisen there. We admit that we are liable. (WEATHERBE, J.—Have we any practice to provide for notice?) I have never seen any notice. The

defendant must be held to strict practice, and no loose id[illegible]as must be allowed to prevail. No notice being provided for [illegible]by common law practice or by the rules themselves, the defau[illegible]t is regular and cannot be set aside.

Graham in reply.—The Judge put his decision on [illegible]he ground, not that in ordinary cases notice would not [illegible]be required, but that in his opinion the defendant had all [illegible]he notice required. I contend that the relator cannot be m[illegible]de liable unless by the order of the Court. In the *Queen* v. *McKarcher* the action was brought on one of these bon[illegible]ds. Previously in the *Queen* v. *Murray*, 1 R. & C., 58, it w[illegible]as held that the actual promoter of the cause could not be ma[illegible]de liable, as the statute had given the Clerk of License the righ[illegible]ht to sue without special leave, using the name of the Queen.

A relator is well known in Equity; *Story's Eq. Pleadings* [illegible]s, secs. 7, 8, 9; *Bouvier's Law Dict.*, Title, "Relator." In the[illegible]e case of *quo warranto* the relator is required by statute. This [illegible]is is not the case of a relator, and I do not see why that [illegible]at name should be given him. I contend that the only way in [illegible]in which he can be made liable is by the order of the Court. [illegible]rt. (WEATHERBE, J.—Is there any authority for a relator in the[illegible]e common law courts? RITCHIE, E. J.—The question does not[illegible]ot arise, because the parties have assented to the orders and[illegible]nd have come here to argue another question.) I am not pre[illegible]e-cluded from arguing that the party could only be made[illegible]de liable on the order. I think we are entitled to notice, though[illegible]gh I can find no authority. In *McIsaac* v. *Metzler* there was [illegible]a rule *nisi* for security which was not made absolute. Plaintif[illegible]ff went to trial, and the verdict was set aside on the ground tha[illegible]at the order was outstanding and undischarged.

SIR WILLIAM YOUNG, C. J., now, (January 19th, 1880[illegible]80,) delivered the judgment of the Court:—

This is an appeal from the County Court at Tru[illegible]ro upholding a judgment by default, the defendant having be[illegible]een sued on a bond to the Queen in the form prescribed by th[illegible]the License Act, chapter 75, sections 25 and 26, schedule [illegible]E. Carter had been committed for a violation of the Act in a su[illegible]uit brought by Edward S. Blanchard, Clerk of the License a[illegible]nd Murphy and Fraser became his sureties on a writ of certiora[illegible]ri, one of the conditions of the bond being that during t[illegible]he

pending of the said writ Carter should not violate the provisions of the License Law. This he was charged with doing, and the present action was brought January 2nd, 1879. On an affidavit of Murphy, the Judge, on the 21st January, granted a rule *nisi* requiring the plaintiff's attorney to endorse upon the original writ the name of the Clerk of License or such other person at whose instance the action had been brought, to respond the final judgment that might be obtained by the defendants. This was served on the attorney on the 25th January, and on the 1st of February he endorsed on the writ Mr. Blanchard's name as Clerk of License, and notified the defendant's attorney that he had so done. On the 5th, however, the latter obtained from the Judge a rule making the rule *nisi* absolute, drawn in a form which we had adopted in a former case, *The Queen* v. *McKarcher*, 3 R. & C., 337. It directed the endorsation which had been already voluntarily done but was unknown to the Judge, and gave the defendants ten days to plead from the date of the endorsation contemplated by the rule. This was served on the plaintiff's attorney February 7th, who endorsed Mr. Blanchard's name a second time as Clerk of License February 8th, and on the 19th, ten days having expired, marked a default for want of a plea.

These facts involve two points of practice. Ought the defendants to have been content with the first endorsation, of which they had notice? I think they ought. Both parties recognised and acted on our former rule, and the Clerk of License, having endorsed the writ in compliance with it, its avowed object being to create a liability for costs, could not have disputed his liability had he failed in his suit. Then it is admitted that there is no practice making it imperative on, nor did the rule absolute provide for, the plaintiff's attorney giving notice of the second endorsation, and, although the defendant's attorney swears that such endorsation was unknown to him, I think it binds him, and that if his client could have sworn to merits, he should have moved for leave to plead upon terms.

The judgment in *The Queen* v. *McKarcher* was an oral one, and the present argument has led us to look again into the grounds of it. A relator was unknown to the common law, and was introduced for the first time by the 9th Anne, chapter 20, in cases of *Quo Warranto*, which this Court acted

on in *Spence's* case, 1 Oldright, 333. It has long prevailed in Chancery; *Story's Equity Pleadings*, sections 7 to 9; and we adopted it in analogy to Equity Practice in *The Queen* v. *Humphrey*, 2 R. & C., 600, where there was a plea on equitable grounds. In the case before us, being a bond to the Queen for her use, that is, for the public use, the Queen was entitled to costs by the Statute of Extents, 33 Henry VIII., chap. 39, sec. 54. Surely, then, a defendant should recover his costs from a party using the Queen's name. There is no particular form that I see for the relator coming in to admit his liability, and I think it a convenient mode that, either voluntarily in the first instance, or under the order of the Court, his name should be endorsed upon the writ, and so become matter of record. *Bouvier* says that no judgment for costs can be rendered for or against relators, and cites some American cases not within our reach, but the statute of Anne makes them liable for, and entitles them to recover costs, and we would have no difficulty, I think, in granting an execution for or against them according to our judgment.

RITCHIE, E. J.—I concur with the Chief Justice in thinking that the appeal should be dismissed, but as the order requiring that the name of the person on whose behalf the suit was brought should be endorsed on the writ was not appealed from, and I have heard no argument on the point, both parties recognizing it to be valid, I express no opinion upon it. The only question brought before us on the appeal is whether the decision of the County Court Judge, that the default marked was regular, was right, and in my opinion it was.

If an application had been made to the Judge for leave to remove the default, on an affidavit of merits and of surprise, if such an affidavit could have been made, he would, I have no doubt, have granted it though the default had been regularly entered.

WEATHERBE, J.—I wish to be considered as offering no opinion on the subject of introducing a relator into common law proceedings, nor can I see that an entry of the name of a relator here without an order is a compliance with the decision of this Court cited in the argument. The question seems to me to be, was a notice necessary? I do not see that it was.

KENNY *v.* UNION MARINE INSURANCE COMPANY.

PLAINTIFF'S policy of marine insurance contained a condition that if the assured had made any other insurance on the property prior to the date of the policy the insurers would be answerable only for so much as the amount of such prior insurance should be deficient towards fully covering the premises thereby insured. It appeared to the Court that under prior insurances the plaintiff had been fully indemnified, and the verdict for the plaintiff was accordingly set aside with costs.

THIS was an action on a policy of insurance. The application was made by the plaintiff in his own name, but was admitted to have been made on behalf of all the owners. No question was raised as to the value of the vessel or the application of the policy to the voyage, but defendants relied on a condition in the policy that, in the event of prior insurance having been effected on the same property, they should be liable only for the amount by which said prior insurance failed to indemnify the plaintiff for his loss, a *pro rata* proportion of the premium to be returned in such case. No premium was actually paid, and none was therefore returned, and defendant in the plea set out that the plaintiff had been fully indemnified by prior insurance. A verdict was found for the the plaintiff, and a rule *nisi* granted by the learned Chief Justice to set it aside.

Graham, for rule.—Our contention is that the valuation in the policy determines the value of the vessel; that having been previously insured to that amount in other companies, and having been paid, plaintiff is not entitled to claim anything from the defendant company, the policy stipulating that in a case like the present the company can only be called upon to pay the balance. Having already received the full value of the vessel, as determined by the policy, there is no balance. The clause to which I have called attention is contained in American policies but not usually in English policies, and is called "the American clause." This clause was discussed in *Rider* v. *Phœnix Insurance Co.*, 98 Mass. Reps., 185. In that case it was held that the policy did not take effect because there were previous policies exceeding the agreed value at the time. (MCDONALD, J.—If one of the previous policies had been invalid, you admit that this would have attached.) Yes. My second point is that the contract of insurance is

one of indemnity, and that the insured received the full value under the previous policy. See *Morgan* v. *Price*, 4 Exch., 615; also p. 613 in *Bullen and Leake; Bruce* v. *Jones*, 1 H. & C., 769. (SMITH, J.—The American clause then, merely carries out the Common Law.) It goes further. Under the clause the policy does not attach at all; *5 L. R., Q. B.*, 244.

Rigby, Q. C., contra.—We admit that we cannot recover more than the amount by which the prior insurance is deficient. That principle is too well established to admit of doubt. The defendants say we have been paid the full amount, but they must prove this. Mr. Kenny insured the whole vessel, valuing her at $16,000, in two policies, issued at the same date, and for the same amount each, $6000, or $12,000 in all. The insurance was not for himself, but for the other owners as well. This is proved. The plaintiffs were the ship's husbands, and insured for all. Apart from these policies, and prior to them in point of time was a policy for $4000 on half the vessel, valuing her also at $16,000. The $12,000 was for all the owners, including himself on the whole vessel, valuing her at $16,000. That left $4000 uninsured. The Court is asked to infer that both these amounts were on Kenny's half, but that is something which the other side should prove. Have the defendants made out their plea and proved that both insurances were on Kenny's 32/64? Kenny was managing owner and responsible for keeping the vessel insured.

The risks in the different policies are not the same. *Kent* v. *Manufacturers' Ins. Co.*, 18 Pick., 19. The insurances in the case before the Court were time insurances, with the exception of the one sued on. The first was a voyage policy, and the others were time policies. It amounts to this, that $10,000 are insured on one half the vessel and $6000 on the other half. The one half was over insured to the extent of $2000, the whole value being $16,000. (YOUNG, C. J.—To whom would the $4000 go?) I assume that it would not go to the owners generally. (DESBARRES, J.—There is no proof of that, and we are left to grope in the dark.) If it is not clear it is the fault of the other side. It was their business to adduce the evidence which would have made it plain.

Thomson, Q. C., in reply.—The defendants did everything they could to make the matter clear. It was not until the close of the case that the plaintiffs put in the papers that we required, and then only to satisfy the Judge. Kenny himself was not placed on the stand, and only a clerk called. If he knew anything about the matter he carefully concealed it. All the legal presumptions are in our favor, and by secondary evidence we supplied the information required. If your Lordships look at the the receipts you will find a statement under the plaintiff's own hand showing the time of the loss,—only six days after the last policy was effected.

It is assumed that the $4000 was effected for the benefit of the other owner. I don't think this can be assumed, but we have evidence. The receipts show that T. & E. Kenny received the money, and Thomas Kenny and T. & E. Kenny are the same person, as appears by the plaintiff's writ. The $4000 was to go to the owners generally because Kenny was managing owner. It is never the duty of the ship's husband to insure the shares of particular owners. The policy of the law is against such a course, as it may lead to fraud. His duties are laid down on *McLachlan on Shipping*, 163 to 167, and this is not among them. In the face of the evidence that the insurances were for all it cannot be said that Kenny did not insure for himself. Cites *2 Starkie's Reports*, 345.

Rigby, Q. C.—We will file a *remittitur* in this cause of $1106, leaving a balance claimed of $1894.

DESBARRES, J., now, (January 19th, 1880,) delivered the judgment of the Court:—

This was an action on a policy of insurance for $3000, effected by the defendants on the 13th of January, 1877, on the brig "Hannah D.," one-half of which was valued at $8000. Although the insurance was made on the application of, and in the name of the plaintiff, who was himself owner of one-half of said vessel, it was admitted by his counsel at the argument to have been actually made for the benefit and protection of all the other owners as well as himself. This being a valued policy upon which no objection could be raised as to the value of the vessel, and it being admitted on the part of the defendant that she was lost on the voyage men-

tioned in said policy, that is to say, "on a voyage at and from St. Thomas to Savannah, and from thence to Buenos Ayres or Montevideo," we are to consider whether upon the law and facts of this case the verdict found in favor of the plaintiff for the full amount of the insurance can be sustained, or whether it ought to be set aside and a judgment entered for defendant, as directed by the rule *nisi* granted by His Lordship the Chief Justice, who tried the cause.

The third and fourth pleas of the defendants raise issues on which they rest their defence. Both refer to a clause or condition in the body of the policy of an important character, having, as it appears to me, an important bearing in this case, and calling for due consideration at our hands. It is in these words; "And it is hereby declared and agreed that if the said assured shall have made any other insurance upon the premises prior to the date of this policy, then the said Union Marine Insurance Company of Nova Scotia shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured, and the said Union Marine Insurance Company of Nova Scotia shall return the premium upon so much of the sum by them assured as they shall be by such prior insurance exonerated from." Now, the defendants' third plea as to the first count, after setting out the condition, alleges that the plaintiff had made other insurances upon the said premises prior in date to the said policy, and the amount of such prior insurance was not deficient towards fully covering the said premises, and at the time of said loss fully covered the same, whereby the defendants are answerable for nothing. And the defendants, because the plaintiff has never paid to defendants the premium payable under said policy, have never returned the same. The defendants' fourth plea to the said count is much to the same effect. It alleges that the plaintiff had caused other policies of insurance to be made on the same brig or vessel mentioned in the said policy declared upon, prior in date to the said policy, and outstanding at the time of the loss of said vessel, and the sums by said other policies insured to the plaintiff, and for which they were subscribed by divers insurers, amounted altogether to a sum equal to the value of the said brig or vessel, and thereby the whole interest of the said plaintiff in

the said brig or vessel was insured to the extent of the value thereof at the time of the making of said policy in said count mentioned, and up to and at the time of said loss, irrespective of the policy declared upon, and that the risk intended to be covered by said policy was covered by said other previous policies; that the said brig or vessel was lost, as is alleged in said count, after the making of said policies, and that the several insurers upon the said brig or vessel who subscribed the said other and previous policies, and thereby became insurers thereon to sums amounting in the whole to the value thereof, paid to the plaintiff and the plaintiff received and accepted from the said insurers under such policies other than the policy in said first count mentioned, sums amounting altogether to a sum equal to the said value of the said brig or vessel, and the plaintiff then and thereby became satisfied and indemnified for the said loss of the said brig or vessel as agreed upon in the said policy in such count mentioned.

It appears from the report of the learned Chief Justice that three several policies of insurance other than and besides that sued upon were effected by other and different insurance companies on the said vessel, on the application and in the name of the said plaintiff, prior to the date of the policy declared upon, viz., a policy issued by the Merchants' Marine Insurance Company, dated, as may be inferred from the date of the application, on the 30th of December, 1876, for $4000, for twelve months from the 12th of December, 1876, on one-half of said vessel, valued at $12000; another policy issued by the Ocean Marine Insurance Company, dated February 8th, 1877, for $6000, on said vessel, valued at $16000; and another policy issued by the Atlantic Marine Association on the said vessel for $6000, dated February 8th, 1877, for one year from the 27th of January, and valued at $16000. The respective sums insured on the said vessel by the three last-mentioned policies amounting altogether to the said sum of $16000, the fixed and recognized value of the said vessel, having been fully paid by the insurers thereof to the plaintiff, as the receipts of the latter, produced by the defendants on the trial, clearly shew, the question arises whether the plaintiff can legally recover anything beyond that amount, and whether the verdict found for the plaintiff for the full sum insured for and claimed

er the policy declared upon can be sustained. My own nion is that it cannot, because the evidence shews that the intiff has already received all that he can demand, that is, e value of the vessel declared upon, and nothing more; ything beyond that would be just so much in excess of his st claim.

The case of *North of England Association* v. *Armstrong*, L. R., Q. B., 244, is to my mind conclusive on this point. In that, COCKBURN, C. J., lays it down as an established principle that where the value of the thing insured is stated in the policy in a manner to be conclusive between the insurer and the insured, "then in respect of all rights and obligations which arise upon the policy of insurance the parties are estopped between one and another from disputing the value of the thing insured, as stated in the policy." See also *4 Exch.*, 768; *1 H. & C.*, 769. It is not to be presumed that the plaintiff, in causing insurances to be made on the brig "Hannah D.," would estimate her at less than her value. But whether she was over or under-estimated is not now a subject for inquiry; the value fixed and recognized between the insurers and the insured must be considered as the true value. In the first policy, dated December 30th, 1876, the vessel was valued at $12000. In the other policies, including the last, she was valued at $16000. The last-mentioned sum has been clearly proved to have been paid over to the plaintiff by the prior insurers, covering the full value of the vessel, and leaving no deficiency for which the defendants can be held responsible on the policy sued upon. The plaintiff having, therefore, received all that he can justly and legally claim for insurance on the said vessel and been indemnified to the full extent of the loss insured against, is not, for this reason, entitled to recover anything under the policy sued upon. He has, however, a right to demand and receive from the defendants a return of any premium he has paid on that policy, a demand which I have no doubt will be responded to whenever it is made.

I am of opinion, for the reasons given, that the rule *nisi* granted for setting aside the verdict in this cause ought to be made absolute with costs.

MURRAY *v.* GASTONGUAY ET AL.

At the maturity of defendant's note to plaintiff for $263.75, the defendant gave plaintiff a renewal note for $150 and promised to pay the balance in cash next morning, which plaintiff said was all right, but on the same day the original note was sued, plaintiff still holding the renewal note, which was a negotiable instrument.

Held, reversing the decision of JOHNSTONE, J., that the plaintiff could not recover on the note sued on.

THIS was an action on a promissory note tried before JOHNSTONE, J., of the County Court. It appeared from the evidence that the defendants, being indebted to the plaintiff, gave their promissory note for $263.75. At the maturity of this note they gave a renewal for $150, and promised to pay the balance in cash next morning, which plaintiff said was "all right," but on the same day the original note was sued, plaintiff having in his hands at the time the negotiable note of the defendants for part of the amount.

The learned Judge of the County Court, in pronouncing judgment, remarked that the conduct of the plaintiff or his clerk was undoubtedly very sharp, but the renewal note had only been accepted conditionally, and the conditions had not been fulfilled. The defendants, he observed, should have tendered the difference between the two notes, or paid the money into Court. They were entitled to the renewal note, but the judgment of the Court must be for the plaintiff for the amount of the note, $263.75 and interest.

From this judgment an appeal was taken, which was argued this term before SIR WILLIAM YOUNG, C. J., RITCHIE, E. J., SMITH and WEATHERBE, JJ.

Lenoir, Q. C., for appellant.—The plaintiff agreed to renew the note declared on, and did in fact renew it, taking another promissory note in substitution for it. Before this note arrived at maturity plaintiff sued the original note without returning the renewal, which was a negotiable instrument, and which at all events should have been returned to the defendant before suing. The agreement entered into by the plaintiff to accept the renewal note and the balance in cash was an absolute discharge of the old note; *Byles on Bills*, 368; *2 Cr. & J.*, 405; *Fisher*, p. 3338; *5 T. R.*, 513; *7 Moore*, 431; *1 Bing.*, 100.

McCoy, Q. C., contra.—There was no consideration for the promise to give additional time. The plaintiff has given particulars under the common counts as well as on the note, and can recover on the common counts. *2 Chitty on Pl.*, 349; *5 Wend.*, 490; *4 Bing.*, 9; *5 Q. B.*, 54; *2 Camp.*, 238; *3 M. & W.*, 21; *2 B. & Ald.*, 210; *5 U. C. Q. B.*, 336.

LeNoir in reply cites *Torrance* v. *Bank B. N. A.*; *Fisher's Dig., 1873*, p. 62; *L. R., 5. P. C.*, 246.

WEATHERBE, J., now, (January 19th, 1880,) delivered the judgment of the Court :—

In *Kendrick* v. *Lomas*, 2 C. & J., 409, BAYLEY, B., said; "The Court is quite satisfied. A bill of exchange becomes due about the 7th of January, and another bill of the same amount, dated the 5th of January, is handed over to the party holding the first bill for and on account of and in renewal of the first bill. Before the bill so handed over becomes due, the action is brought on the first bill. Now the second bill being a negotiable instrument, I think that, on the general issue, the plaintiff would be precluded from recovering on the first bill until he makes out satisfactorily that the defendant cannot be liable on the second, and that he virtually undertakes not to sue on the first until he delivers up the second." As the case was presented to us we all think it must be governed by this law. This view corresponds with what fell from the learned Judge in the case relied on by plaintiff's counsel in *5 U. C. Q. B.*, when he said; "This plea sets up as a defence not that a note of the party was given at the time which would suspend an action on the original demand, but that in consideration of certain notes being deposited with the plaintiff as security which had a certain time to run, the plaintiff agreed not to sue, &c."

The appeal will be sustained with costs.

IN RE DONALD McEACHERN.

THE Court made absolute a rule *nisi* for a *habeas corpus* where it appeared that the prisoner had been arrested on an execution for penalties under the License Laws, the Justices having proceeded with the cause in the absence of defendant without an affidavit of the service of summons, although on the hearing of the rule *nisi* it was made to appear that the summons had actually been served.

IN this case on a previous day in term *Rigby, Q. C.*, moved for a rule *nisi* for a *habeas corpus* on an affidavit setting out that the prisoner had been arrested under an execution for penalties for violation of the laws relating to the sale of intoxicating liquors, the Justices having gone on with the hearing of the cause in the absence of the defendant without any affidavit of service of the summons and without the summons having been served.

On the motion to make absolute the rule an affidavit was read contradicting the statement as to service of the summons, but it was not shown that any affidavit of service had been made or produced before the Justices.

Ritchie, Q. C., contended that the conviction must be presumed to be regular, and if there was any defect it was for the defendant to show that defect on certiorari. *7 D. & R.*, 622; *Rex* v. *Taylor*, 1 D. & R., 156; *Rex* v. *Rogers*; *Rex* v. *Elwell*; *4 Com. Dig.*, 435. On a *habeas corpus* it is not competent for the Court to enquire into the judgment unless the papers are before the Court on certiorari. The same principle is affirmed in *Clark's Case*, 12 Cushing, 120 (McDONALD, J.—This is not a case of an irregularity, but a nullity, if there was no affidavit of service before the magistrate.) The Court must presume that there was an affidavit. (McDONALD, J.—I think we have a right to assume that there was not, after the affidavit read by Mr. Rigby.) *Meagher.*—That affidavit is contradicted. (McDONALD, J.—You merely show that there was a service, not that it was sworn to at the trial. (WEATHERBE, J.—All the case in *Cushing* shows is that what takes place at the trial is not generally gone into. Does not our statute require us to enquire into the legality of the imprisonment? That is the whole question.) *Ritchie, Q. C.*, cites *2 Bouvier's Law Dict.*, 513

SIR WILLIAM YOUNG, C. J.—We are all of the opinion that the application must succeed, as there was no affidavit of service of the summons to warrant the Justices in proceeding with the case.

WEATHERBE, J.—The Justices had no jurisdiction in the absence of the defendant without an affidavit of service of the summons.

Rule absolute.

SCOTT *v.* ROYAL HALIFAX YACHT CLUB.

An application having been made for leave to issue an execution against an individual member of the defendant club, an execution against the club having been returned unsatisfied,

Held, that section 13 of chapter 53, R. S., created no new liability on the part of members of a corporation, but merely provided that they should not be relieved from any liability that would have attached to them as partners, if unincorporated; that the members of defendant club would not, if unincorporated, have been liable as partners, and the statute was not intended to apply to such a corporation; and even if this were not the case that the plaintiff could not hold an individual member liable without proving that he was a member at the time of the return of the execution issued against the club.

Rule *nisi* for leave to issue execution discharged, but without costs.

IN this cause a rule *nisi* had been obtained for leave to issue an execution at the suit of the plaintiff against John Pugh, a member of the defendant club, on the ground that said Pugh was individually liable for the debts of the club, under R. S., cap. 53, sec. 13, the club being an incorporated body, and an execution issued against the corporation having been returned unsatisfied. A motion was made before SIR W. YOUNG, C. J., DESBARRES, MCDONALD, and JAMES, J J., to make this rule absolute.

Eaton, for rule.—In the act incorporating the club there was no limit to the liability of members. Acts of 1860, chapter 71; Acts of 1870, chapter 97. Cites *Abbott's Dig. Corporations*, 405; *1 C. B., N. S.*, 66. The English statute, 7 & 8 Vict. chapter 113, was more restricted than our own. By the English act an application is required to be made to the Court.

Atty. General, contra, asked permission to file an affidavit in regard to the character of the club, and also in regard to the time when the return to the execution was filed, and proceeded to urge the following arguments:—

The act, R. S., cap. 53, does not apply to such an organizations as this. Several clauses show that the Legislature referred to trading corporations, and not to clubs for

promotion of sport or science. The act creates no new liability, but simply preserves a common law liability. At common law no liability would exist. Members are only liable to the same extent as if no partnership existed. In England the winding up acts are held not to apply to corporations of this character. *2 DeG., McN. & G.*, 383. Here it was made applicable by special legislation last session. The point of the case cited is to show that members of these clubs are not liable as partners. It is necessary to show that Mr. Pugh was a member of the club at the time the execution was returned, if not at the time when the debt was incurred. The return is not dated. *Fisher's Dig.*, 7912. The former English statute is superseded by 7 & 8 Vict., c. 17. In *Nickson* v. *Greene*, 11 Exch., 549, the construction of the statute is shown. The case is reviewed in *3 H. & N.*, 694; *2 M. & W.*, 172. This was an attempt to fix a liability upon members of a club for goods ordered by a committee for the use of the club. On the same point see *8 M. & W.*, 505. The English cases show that the manner of charging members is by *scire facias* and not by motion. *2 Dowl., N. S.*, 355; *10 M. & W.*, 506. The statute on which this judgment was given was 4 & 5 Vict., chap. 89. This remedy is not available by one member against another.

Eaton in reply.—There was no question involved here as regarded the corporation and creditors. In the case in *8 M. & W.*, the club had a right to plead as to its liability, but here that question was fixed. Our statute refers to debts and obligations of corporations, and says no member shall be relieved. We could not have got judgment against the corporation if there had been no liability. The Act of 1879, chap. 32, sec. 23, fixes the liability of members beyond dispute. Execution against the members of the corporation follows as a matter of course. *1 C. B., N. S.*, 66. If the word used in the act was "company" there might be a distinction. The act, however, applies to all corporations. Mr. Pugh was a member of this corporation all the time that this liability was accruing.

McDONALD, J., now, (February 16th, 1880,) delivered the judgment of the Court:—

The Halifax Yacht Club was incorporated by an act of the Legislature in 1860, and in 1879 its name was changed by

an amending act to "The Royal Halifax Yacht Club." Alex. W. Scott was a member and an officer of it, and after his death his administratrix obtained a judgment against the Club for $2464.16, for causes of action arising while he was such officer. On the 23rd of September, 1879, an execution was issued on the judgment and placed in the hands of the Sheriff on the same day. It was returned not satisfied, but the date of the return does not appear. Mr. Eaton in his affidavit bases his knowledge that Mr. Pugh was a member of the Club upon the evidence given by the latter in another cause some time before this application, but the date is not given, and therefore it is difficult to say whether he was or was not a member of the Club at the time of the Sheriff's return. The plaintiff now makes this application under section 13, chap. 53, R. S., for leave to issue an execution against Mr. Pugh. The section referred to reads thus; "No member of any corporation shall be relieved from individual liability for its debts or obligations, but each member thereof shall be liable as a partner to the same extent as if no corporation existed; and in case any execution issued on any judgment against the corporation be returned unsatisfied, the individual real and personal estate of every member of the corporation shall be liable to respond such judgment under execution issued thereon in the same manner as if the same were a private debt due by such member, unless the special act creating the corporation shall exempt its members from such liability; and any member who shall be compelled to pay any monies on account of the debt of the corporation shall be entitled to credit therefor in the books of the corporation."

The point was, I think, well taken, that this section creates no new liability against the individual members of the corporation, but simply provides that they shall not be "*relieved*" from individual liability, and shall continue, notwithstanding that they are incorporated, to be liable as partners to the same extent as if they were not incorporated. Their liability does not go beyond that. What then would be Pugh's liability as partner if the corporation had not existed? Clearly nothing. "Partnership is the result of a contract whereby two or more persons agree to combine

property or labour or both for the purpose of a common undertaking and the acquirement of a common profit." *Smith's Merc. Law.* In the case cited from *2 DeG., McN. & G.*, 383, the Lord Chancellor said; "The law, which at one time was uncertain, is now settled, that no member of a Club is liable to a creditor, except so far as he assented to the contract in respect of which such liability has arisen. The member pays on the spot, and were he also liable to those supplying the article he would pay twice over." Again he says; "Bearing in mind that the individuals who form a Club do not constitute a partnership, nor incur any liability as such, I think that associations of that kind are not within the meaning of the winding up act;" and he asks why the word "club" was not used in the statute if it was intended so to apply it. I think it is abundantly clear that the whole of section 13, (relied upon by the plaintiff,) of the chapter referred to, (chap. 53,) was not intended by the Legislature to apply to corporations such as the one under consideration, but it is evident that it means any corporation, the members of which would be co-partners in business if they had not been incorporated, and that it was the intention of the Legislature not to hold those liable as partners who, if not incorporated, would be no partners at all, but to provide that members who would in such case be partners should not escape their liability as such, in consequence of their being incorporated.

Even if this were not good law I think it was incumbent upon the plaintiff, in order to hold Mr. Pugh liable, to show that he was a member of the Club at the time of the return of the execution. It is true that the English act, 8 & 9 Vic., cap. 16, upon which that point was decided in *Nixon* v. *Green*, 11 Exch., 549, affirmed in *3 Hur. & Nor.*, 694, is somewhat differently worded from ours; but it cannot be reasonably contended that our act could have meant to hold all persons who at any time, however remote, were members of a corporation, responsible individually for all debts and judgments outstanding against the corporation, with which liabilities they had nothing to do and which were no charges against the defendants while they were members. The contention of the learned counsel for the plaintiff led him so far as to urge that every individual member of a religious congregation, if

incorporated, would be separately liable for the whole debt of the congregation in the same way as he seeks to hold Mr. Pugh liable now. Surely such was never the intention of the Legislature. If it were, what security have the individual members of the corporation of the City of Halifax and of the various county and town corporations of the Province against being ruined in one day without any fault of their own?

I think it unnecessary to refer to other authorities cited on behalf of Mr. Pugh by the Attorney General, all of which go to sustain his contention. The rule *nisi* must be discharged, but without costs.

IN RE ESTATE OF EVANS EX PARTE FALCONER.

THE power given to the Court or Judge by section 125 of the Insolvent Act of 1875, to remove an assignee, is confined to the case of an assignee disobeying an order made under said section, and does not extend to other misconduct on the part of the assignee, the general power of removal being committed to the creditors under section 29.

The Judge of the County Court removed an assignee and it appeared that an agreement had been made without the knowledge of the creditors generally, under which the assignee conveyed the estate to his father, and co-partner, the partnerships guaranteeing thirty-three and one-third per cent. of the defendant's composition of forty per cent., and receiving from the insolvents $1000 for their guarantee,—the father to hold the estate as a security for the payment of the $1000. The Court reversed the decision of the County Court on the ground above indicated, but refused the assignee the costs of the appeal and argument, and of the proceedings in the County Court.

JAMES, J., dissenting as to the costs.

IN this matter, David Falconer, a creditor for $2,329, petitioned the County Court for the removal of John W. DeWolf, creditors' assignee, alleging that the insolvents had agreed to give Thomas L. DeWolf, partner in business of John W. DeWolf, a bonus of $1,000 out of the assets of the estate, in contravention of the Insolvent Act of 1875.

The matter came before the Court on an appeal from the following decision pronounced by JOHNSTONE, J.:—

Having already decided that this Court has jurisdiction over the assignee to the extent of removing him for cause, it now remains to determine whether the petitioner has made out a case calling for the exercise of that power.

The first specified ground of complaint set out in the rule *nisi* is that the assignee conveyed the estate of the insolvents

to his own partner in business without lawful authority. The insolvents procured a deed of composition and discharge to be executed by their creditors, which was, at a meeting called for that purpose, accepted and approved. On this being done, the assignee, John W. DeWolf, by and with the consent of the insolvents, transferred the estate absolutely to his father and partner, Thomas L. DeWolf.

I had previously held, and am still of opinion, that the deed of composition and discharge is not properly executed under the meaning of the act until it is confirmed by the Judge, until which time the assignee has no authority to transfer the estate. The assignee should, therefore, have awaited its confirmation before acting under it, and consequently his transfer of the estate was, if not inoperative, yet premature. Immediately on, or shortly after the transfer, the assignee handed the estate over to the insolvents, who have since managed it as agents of Thomas L. DeWolf. I think that the assignee erred in transferring the estate to his father and partner, and for the following reasons:—

1. The compromise offered by the insolvents was forty cents on the dollar; of this thirty-three and a third cents were guaranteed by the assignee and his father, and the estate was confessedly held as security for the guarantee. Under these circumstances, the transfer to the partner and co-guarantor can only be held to be a transfer to the assignee himself through the medium of his father, and upon no principle can the assignee be justified in guaranteeing any portion of the dividends, or in obtaining possession of the estate, or any portion of it, either by purchase or conveyance.

2. Though, after the transfer, the assignee may remain inactive, yet, until discharged, he is still the assignee, and on the failure of the insolvents to carry out the terms of the compromise the office revives, and it is the duty of the assignee to resume possession of the estate. Should such a contingency arise here, it is not difficult to perceive how the interests of the assignee in the estate as a guarantor would clash with the duty he owed to the creditors.

3. The insolvents obtained the execution of their deed on their promise to pay forty cents, and the creditors have the right to have the estate held as security for the payment of

the whole compromise, but in contravention of this right the assignee transferred the estate absolutely to the party guaranteeing but thirty-three and a third cents of the amount, and whose interests it will be to secure the amount of the guarantee even at the sacrifice of the assets of the estate, and the possible consequent loss to the creditors of a portion, if not the whole, of the remaining six and two-third cents.

4. The most serious mistake made by the assignee was in neglecting to communicate to or consult the creditors in reference to the $1000 agreed to be paid to Thomas L. DeWolf, of which arrangement they seem to have been kept in profound ignorance. The insolvent, Howard C. Evans, stated "that the bonus was not to be paid until the whole forty cents was paid, and only if it was in the estate or the insolvents had in the meantime made it." The assignee, however, says; "My father was to have the security of the estate for the $1000. Our object was to make a commission, and we looked on the bonus in the light of a commission." If the estate is able to realize $1000 beyond the forty cents, then there is in the estate a larger dividend than that sum, and the creditors should have been consulted as to whether they were willing to pay $1000 as the consideration for obtaining a guarantee of thirty-three and a third cents.

The assignee stated that it depended on his father whether he received any portion of the bonus or commission, but at the same time acknowledged that he had an interest in the estate after the transfer, because his father was security; thus shewing that his interest and that of his father were, if not identical, yet closely bound up together, and that, too, independently of his personal liability as guarantor; and it leaves little room to doubt the correctness of his statement that their object was to make a commission, and thus the assignee, in conjunction with his father, would be so much better off than the other creditors. Nor does it appear that the guarantors ran much risk in guaranteeing, for from the evidence it is apparent that neither Mr. Thomas L. DeWolf nor the insolvents thought that the estate would yield at all events less than thirty-three and a third cents.

The other ground stated in the rule is that the assignee and inspectors received and permitted and allowed to be filed

claims against the estate improperly executed, and dividends to be paid thereon, and that they did not examine the claims filed against the estate. Several of the claims were not accompanied by vouchers, and in other respects did not fulfil the requirements of section 104 of the act. For those of them received and allowed by the official assignee the creditors' assignee is not responsible, but some were received and allowed by the creditors' assignee which, under the law, he was bound to reject. But the assignee and inspectors clearly failed of their duty as detailed in section 93 of the act, by not together examining the claims made against the estate, suspicion on some of which was cast in the course of the examinations held before me in this matter, more especially as the assignee could not but have been aware that some claims were prepared by and were in the handwriting of one of the insolvents. It was urged at the argument, in extenuation of the conduct of the assignee in not examining the claims, that it was against the interests of the insolvents to allow claims not *bona fide*, inasmuch as by so doing they increased the liabilities, but, apart from the law being violated, the insolvents might have a direct interest in having bogus claims allowed, or claims in excess of the actual amount due, as thereby they might be able to secure the requisite number and amount to execute their deed of composition and discharge. As regards the charge that dividends were paid on claims improperly executed, the jurisdiction of this Court in respect of the filing of claims is only appellate, and therefore the Court, while it might properly hold the assignee responsible for dereliction of his duty, would have no right to interfere with the dividend on that account, nor would the assignee himself, after having allowed the claims. This ruling is in conformity with what I held in *Black* v. *Vaux*, and for that reason I should not consider the payment of the dividend as an element in this case, even had the assignee, after having executed the deed of transfer, any right to interfere, which I do not think he had, as the payments were not strictly dividends, but payments of the composition.

Considering this case, then, in all its parts, I can come to no other conclusion but that the assignee was guilty of misconduct in his management of the affairs of the estate. I have not seen any case where it was laid down what amount of

misconduct would justify a Judge in removing an assignee, though in some instances the grounds would appear to be slight, as where the assignee on any examination refused to answer a question put to him. But I may refer to *Ex parte Badrett*, a case in bankruptcy in which Lord LYNDHURST held that the rule of the Court was inflexible against all transfers of the bankrupt's estate to the assignee or the commissioners, and not less ought the Court to set its face against the transfer of the estate by the assignee to his partner and co-guarantor, to secure him in the payment of a portion of the composition. I am unwilling to make the assignee here a scape-goat for the sins of others, but I cannot help remarking that, as far as my observation goes, the assignees, as a general rule, are far too lax in their management of the estates they are entrusted to "wind up," while the partial opening up of more than one deed of composition and discharge has proved that such deeds are not free from at least the suspicion of fraud, and that the insolvents are too much in the habit of dictating their own terms to the creditors. Whether the deed here is freed from all such taint it is not necessary at present to say. I think, however, that on many accounts it will be for the benefit of the estate and the creditors that the assignee should be removed. As regards the costs of the petitioner, as this is the first case of the kind that has come up before me, and as I do not believe that the assignee's conduct was induced by corrupt motives, I am unwilling to mulct him in costs to be paid out of his own pocket. In *Lord Henly on Bankruptcy* I find a case where, when an assignee retires for the benefit of the estate, he does not pay costs, and, though the assignee has not retired voluntarily, yet, as I think the estate will be benefited by his retirement, I shall direct the costs to be paid the petitioner out of the estate. My so doing herein is not to be cited as a precedent in other cases.

I order that the assignee, John W. DeWolf, be discharged and a new assignee chosen in his room, and that the costs of this application be paid out of the estate. The inspectors do not appear, but as their only misconduct, as proved, was in not examining the claims with the assignee, I shall make no order affecting them.

The appeal taken from this decision was argued this Term.

Weeks, for appellee, took the preliminary objection that there were no grounds set out in the rule. The appeal was taken under chapter 29, section 20, of the Acts of 1875. Cites section 128 of Dominion Acts of 1875. There is nothing to shew how the appeal got here but the rule. *Clarke's Insolvent Acts*, (Edition '77,) 306; *Hamilton* v. *Bourgeois*, 3 Pugsley, 282. The latter case establishes that a party appearing must shew that all the preliminary steps were duly taken. What are those steps? There is no petition for appeal. The reference in the rule is not enough.

Ritchie, Q. C., for appellant.—After the deed was executed by a majority of creditors, a deed of transfer was executed. The judgment was on the ground that the assignee had no right to transfer the property to any one until after the deed of composition and discharge was confirmed, and that it might also be bad because the assignee was interested. The question is not whether the deed is good or bad. I may admit it to be bad, but the question is whether an assignee is to be removed because an insolvent and assignees enter into a deed of this character, and he signs it. It is a fair deduction that every creditor who signed the deed knew that the assignee was not making the guarantee he did make for nothing. I contend under section 6 of the Insolvent Act that the assignee had a right to make the transfer as soon as the deed of composition was executed. I admit that the conveyance would not be complete until after the confirmation, and that the assignee could go in and take possession on failure of the insolvent to pay, but the question is whether the assignee did wrong. I hold that the assignee acted strictly within the act, and did merely what he would have been compelled to do. The insolvent must have his estate to realize on so as to pay his composition. This is the very idea of a composition and discharge. I know of nothing to prevent an assignee guaranteeing a dividend if creditors accept it. I admit he cannot purchase, but that is not this case. (DESBARRES, J.—Your argument is that it was done with the knowledge and consent of creditors.) An assignee cannot be turned out for mistake. The assignee had nothing to do with the signing of the deed. The deed was confirmed at a meeting of creditors, where any questions could have been asked.

The Insolvent Act, section 125, is for the purpose of enforcing obedience to an order. If a Judge directed certain things to be done, and the assignee refused, the Judge might dismiss him, but under section 29 the general power of dismissal is with the creditors, who, at a meeting called for the purpose, may remove an assignee and appoint another. The dismissal in section 125 is an alternative for the purpose of enforcing obedience. Here there was no refusal, as there was no order made. The right to transfer before the deed of confirmation has since been decided in Quebec. Also in *Graham* v. *McKernen*, 42 U. C., Q. B, 372; *1 Ontario Appeal Cases*, 68. In the case in *42 U. C. Q. B.*, the action of the assignee was much more blameworthy than here, for the assignee had conveyed the estate away without any meeting being called, and yet the Court held that at the most he could only be made to compensate parties injured.

Weeks, Q. C., contra, as to the power to dismiss the assignee, cites section 25 of the act, by which officers are made subject to the summary jurisdiction of the Court. Sub-section *b.* of section 28 provides that the official assignee shall be an officer of the Court. These two clauses must be read together to ascertain whether or not the Judge had the power of dismissal. 40 Vic., section 27, amended clause 25, as it then existed, so as to make it applicable to all assignees. The official assignee was an officer of the Court, and as such subject to its jurisdiction, and by section 25 all assignees were made similarly subject. The act must have contemplated the necessity of removing an assignee at any stage of the proceedings at the instance of any creditor injured, else a minority might be defrauded by a majority. The construction sought to be placed on the clause was not one to meet this intention. The clause is doubtful and badly drawn.

There was no appeal from the decision of the Judge asserting his general power to dismiss, and the question cannot consequently be considered now. A clear power to dismiss was conferred by the Ontario Act of 1864, which was the basis of the present legislation. In *17 U. C., C. P.*, 180, there is a decision on a clause from that act, which is similar to our own. The statute gives power to dismiss. There is no appeal from the discretionary exercise of that power, and even if no such

ower is given, there is a decision affirming it which is not ppealed from. An assignee stands in the position of a trustee, nd is not a mere party having charge of the estate. The rinciples applying to trust estates apply to the assignee.

Motton, Q. C., (with *Weeks, Q. C.*).—There would be no objection to the assignee getting $1000, provided it did not come out f the estate. There can be no question that the obtaining of his sum by the assignee was a fraud on the rest of the creditors. f those who signed the composition deed not one was aware f the agreement that the assignee should have this $1000. DESBARRES, J.—The Judge exonerates the assignee from any orrupt motive. The facts you state should have appeared in is judgment.) The Judge had a right to dismiss the assignee n account of his declared intention not to act further. The owers of the Judge over officers include power to dismiss. ee *Wotherspoon*, p. 79, on power of Judge, and pp. 171 & 172 n the question of appeal. See *Ex parte Ridgeway*, 11 L. T., 77, as to powers of assignees.

Ritchie, Q. C., in reply.—The grounds in the rule *nisi* in ie Court below to dismiss the assignee are not the same that e now taken. Sub-section *b.* is almost similar to section 25. It does not go so far as 125. I am satisfied to rest my se on Judge JOHNSTONE'S judgment. A more fallacious dgment I have never seen. The dismissal of the assignee as no preventative of fraud or combination. The power to ake an order was a far more effective preventative. As gards the $1000, Mr. DeWolf's evidence was not in, but it ade no difference and would not alter the effect of the deed. was said the $1000 was to come out of the estate before the rty cents, but there is no evidence of this, and if anything as not paid in consequence of the withdrawal of that amount, ie remedy of the creditors was clear, and the assignee could sume possession. The evidence shews that all the stock oks were before the creditors, and they had every informaon. There is not the slightest proof that the estate was orth more than the forty cents. It is impossible to say what insolvent estate will realize. An outside party could have aranteed the amount without any question being raised, and ie amount received for it must come either out of the estate or om the earnings of the insolvent. It cannot affect the creditors

in any way, because if the dividend is not paid the assignee can resume possession, and if there is a deficiency Mr. DeWolf must make it good. What loss was there to Mr. Falconer in consequence of DeWolf's guarantee? He is in exactly the same position as if the guarantee had been made by an outside party. Sub-section c. of section 28 does not touch this matter at all. The only evidence is that nothing was said of the $1000 at the meeting. not that the creditors did not know of it. There is no proof that the assignee knew any more about the estate than the creditors, who had all the books and papers before them. If the assignee had not the power legally, three-fourths in value of the creditors assented, and having done it with the knowledge and consent of the creditors, is it ground to remove him because one creditor objects? If the assignee had wound up the estate as he was entitled to do, and sold the debts, the creditors might not have got anything like thirty-three and a third per cent. It was only by doing it carefully with the assistance of Evans that the full amount could be realized. The creditors would not think that DeWolf would make the guarantee for nothing, but would assume that DeWolf's idea was that if the estate was wound up under Evans' supervision there would be a surplus after paying the dividend, whereas if Evans went out of the matter, and the debts were sold at auction, the result would be altogether different. If the Judge thought the $1000 was improperly paid he could order the assignee to refund it, while to dismiss him would be no remedy at all.

SIR WILLIAM YOUNG, C. J., now, (February 16th, 1880,) delivered the judgment of the Court:—

This is an appeal from an order of the 23rd of June last from the Judge of the County Court, at Halifax, removing John. W. DeWolf, the assignee of the estate, for which the reasons are given in detail in a printed judgment remitted to us with the other voluminous papers. The decision we have come to on the power of the Judge, under the Act of 1875, renders it unnecessary to go at large into the circumstances which give a peculiar character to this transaction. There were thirty-five creditors of $100 and upwards, whose claims amounted to $37,954, twenty-eight of whom, representing debts of $29,926, executed, on the 22nd of January, 1879, a deed of

composition and discharge, which has not been confirmed by the Court below. The assignee and his father and partner, Thomas L. DeWolf, are parties to this deed, and the insolvents having offered a composition of forty per cent., the two DeWolfs guaranteed the payment of the three first instalments, making thirty-three and a third per cent., the insolvents promising to pay at twelve months the remaining six and two-thirds per cent. On the 20th of March, 1879, the assignee, with the assent of the insolvents, transfers the whole estate to Thomas L. DeWolf by a conveyance under seal, and delivers possession to the insolvents for him. The assignee thus becomes one of the guarantors for payment of the dividend, and conveys the estate without consideration, (for not even a nominal one is expressed,) to his partner,—a state of things probably without example, and which could scarcely arise in good faith. It need not surprise us, therefore, that the creditors who had not executed the deed of composition and discharge protested against the whole arrangement, but their discontent greatly increased when another fact came out, which appears from the evidence and the judgment of the Court below to have been equally unknown to assenting creditors and to the minority. The estate, besides the dividend of thirty-three and a third per cent., was to pay $1000 to Thomas L. DeWolf, in which the assignee was to share for entering into the guarantee, and which the two parties chose to consider as a commission. "It all depended on my father," said the assignee, "whether I received any portion of the $1000. This is all the explanation I wish to make. I don't say whether I have or have not any interest in the commission, that is, in the $1000. Evans, I think, made the arrangement with my father. I was aware of the bargain for the $1000. If he gets the $1000 he gets more than the other creditors. It was a business matter as an inducement to execute the deed. My father was to have the security of the estate for the payment of the $1000. Our object was to make a commission, and we looked upon the bonus in the light of a commission."

These admissions, culled from the evidence of the assignee himself, cannot but be admired for their candour, and the Judge below did not believe that the conduct was induced by corrupt motives. But this is clear, that the transaction, resting

on a secret agreement, is one which no Court could sustain, because it violates the fundamental principle that an assignee must look only to the interest and protection of the whole body of the creditors, and can enter into no scheme or device for securing a profit to himself at their expense. The facts that are in proof, in however mitigated a form they may be viewed, would have amply justified the removal of the assignee, if the Judge has power under the statute to remove him. And this is the point now to be considered quite apart from the merits of the particular case. It turns upon the construction of section 125 of the Insolvent Act of 1875, in the light of section 28, sub-sections *a.* and *b.*, and of the previous legislation. The Dominion Act of 1869 was based on the Canadian Act of 1864, and the true meaning of the present act may be gathered sometimes from what has been added to or omitted from the other two. I pass by the English Acts, which would afford us only imperfect analogies, and which were not at all cited at the argument. Now, by the Act of 1864, sections 17 and 18, any assignee may be removed by the Judge, that is, in Upper Canada as then constituted, the Judge of the County Court, before the period at which dividends may be declared, upon proof of fraud or dishonesty in the custody or management of the estate, upon the application of any creditor, and after the said period by the creditors passing a resolution at a meeting called for the purpose. By the 50th section of the Act of 1869, after empowering the Judge to make an order on summary petition, which was not in the previous act, it is said that obedience of the assignee to such order may be enforced by the Judge or Court under the penalty of imprisonment as for contempt of Court or disobedience thereto, or he may be dismissed in the discretion of the Court or Judge. And by the 51st section any assignee may be removed at the will of the creditors or upon his own resignation. But it is nowhere said that for misconduct, except in the particular case in section 50, he can be removed by the Judge. By the Act of 1875, section 29, the creditors may, at any meeting called for that purpose, remove any assignee and appoint any other in his stead. By section 125, as amended by the Act of 1877, which is based on the 50th section of the Act of 1869, an assignee may be removed in the discretion of the Court or Judge, but

only, as we think, for disobeying the particular order therein mentioned, and not for any other misconduct.

With this view of the statute the appeal must be sustained, and John W. DeWolf will remain assignee, subject to the orders and control of the Court below. But in view of all the facts we have detailed, we do not award him the costs of this appeal and argument, nor permit him to take the costs incident to the motion for his removal out of the estate of the insolvents. All the papers on file we remit to the Court below.

JAMES, J.—I concur with the opinion of the learned Chief Justice except as to the costs. The creditors made a contract with the insolvents to give them up the estate in consideration of their giving security to pay 33⅓ per cent of the 40 per cent composition. In order to obtain this security they must pledge the estate to the surety, who as a matter of course must be paid, not only for the use of his capital but for the risk he runs. It is the interest of the insolvents to obtain the accommodation on as favorable terms as possible. In this instance they had to pay $1000 for the accommodation. I have no means of knowing whether this was a reasonable amount or not; the greater the risk run by the surety the higher ought to be his remuneration, and the non-collection of a single debt might prevent the estate from being sufficient to indemnify him. If the insolvents have agreed to pay too much that is their own look-out. It is said that this bargain was kept secret. Why not? It was nobody's business but that of the insolvents and the surety; and if any one had asked them they would have been justified in telling him so,—politely, of course. But it does not appear that anybody did ask the question, probably because business men would consider such a question impertinent, and therefore they cannot justly be accused of keeping it secret at all. I do not enquire whether the assignee was *legally* justified in mixing himself in this transaction. The law in many cases disables persons acting in a fiduciary character from being interested in the matter entrusted to them, where there is no actual fraud or collusion, but a mere error in judgment. That question was not argued before us but merely alluded to. If the conveyance to the surety was illegal on that ground it can be assailed in the

proper quarter, and set aside without proving any dishonesty on his part. But in this case he is assailed with proceedings which we hold to be illegal, and the general rule of the law entitles him to his costs; if they are refused to him it must be on some sufficient ground, and in this case I can see none. It is said that the surety and the assignee were partners and creditors of the insolvent. I cannot see that this places the creditors in any worse position than if the surety were a stranger. All that the creditors have a right to demand is their composition. If that is paid they get all they stipulated for; if it is not paid to the last farthing at the time agreed upon, or if the deed of composition fails for want of confirmation or any other cause, the surety loses his $1000 and the estate goes back into insolvency and must be wound up for the benefit of the creditors. Under the circumstances in evidence I have arrived at the same opinion as the learned Judge of the County Court on this point, viz., that there is nothing corrupt or dishonest in the transaction.

It is said that this was an injustice to the parties who refused to execute the deed of composition. I cannot understand this at all. If the deed of composition is of any validity it is as binding on those who do not execute it as on those who do. The insolvent must give security for their composition as well as that of those who execute it, and it is their interest as much as anybody's that the insolvent should be untrammeled in his dealings with the estate, so as to procure for them all they ask or care for, that is, security for their compromise. They and their supposed interests, therefore, for they have no separate interests, should not be allowed to control or trammel the insolvent in this respect.

The only possible ground for refusing the assignee his costs being some corruption or impropriety in his conduct, and being unable to see that any part of his conduct has been such as an honorable man need be ashamed to own before all the world, I think that a stigma should not be put upon him, upon the surety and the insolvents, by the unusual proceeding of refusing him his costs in a contention in which he has been entirely successful.

GOULD *v.* McGREGOR.

In an action for breach of covenant for title contained in a deed from defendant to plaintiff, the plaintiff put in evidence a mortgage on which was endorsed what purported to be a certificate of registration. The execution of the mortgage was proved, but the certificate was not proved to have been signed by the proper officer, nor was it tendered as evidence independently of the mortgage.

Held, that as the plaintiff had had no notice of the mortgage, his title was good unless the mortgage was registered prior to the registration of the deed, and that in order to prove such registration it was necessary to shew that the certificate had been signed by the proper officer, the mere production of a paper *purporting* to be a certificate not being sufficient under Revised Statutes, chapter 79, section 18.

THIS was an action brought for breach of covenants for title contained in a deed from the defendant to the plaintiff. On the trial of the cause the plaintiff put in evidence a mortgage of the same property, executed by the defendant previously to the deed, under which plaintiff had been called upon by the mortgagee for the payment of the principal and interest, which he paid without suit or eviction or notice to the defendant. No proof was given at the trial of the fact of the registry of the mortgage, apart from the proof of the execution of the mortgage itself, upon which was endorsed what purported to be a certificate of registry, and no evidence was given to prove that this certificate had been signed by the proper officer. A verdict was taken for plaintiff by consent, and a rule to set it aside was argued this Term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and WEATHERBE, J J.

Attorney-General, for rule.—The mortgage was dated 1st of February, 1873, and the deed February 23rd, 1878. The mortgage was, therefore, prior in point of time, but it would not take precedence of the deed unless it was recorded prior to the deed, or the plaintiff had notice. There was no proof of any of these things. The mortgage was put in, but the registrar's certificate, which was endorsed on the mortgage, was never proved or put in, and cannot be of any avail now; Section 18 of Registry Act, Revised Statutes, p. 363. Proof of the registrar's handwriting was sufficient; section 19. There is no proof here of any eviction. An eviction or something equivalent to it must be shewn. *Rawle on Covenants*, 144. There is no proof of the breach as alleged.

Sedgewick, contra.—When an averment is made and not denied, it is admitted. It is alleged that previous to the

conveyance to the plaintiff the land in question was conveyed in fee simple to third parties. The only plea on which they can rely is the eleventh, denying that the land was subject to the mortgage, which was contradicted by putting the mortgage in. We produced the mortgage and shewed that at the date of the deed the defendant had not the title he covenanted to possess. We shewed that the mortgage was outstanding and unpaid. (DESBARRES, J.—Without giving the party an opportunity of shewing that the mortgage was invalid, and without notice, you undertook to pay the money.) We have alleged that we asked him to pay the mortgage and defend the title, and he did not. If I am satisfied that there is a legal claim, and there is, in fact, a legal claim, I can pay it. *Bullen & Leake*, 43. The defendant in this case cannot set up his own wrong, which is exactly what he is doing. Where a deed is put in and there are endorsements on it, the whole goes in unless expressly excepted. (YOUNG, C. J.—It has always been assumed where a deed is produced with the registrar's certificate that the certificate was *prima facie* evidence. If the handwriting must be proved it will be an entirely new principle.) *Exhall* v. *Partridge*, 8 T. R., 308.

Attorney-General in reply.

McDONALD, J., now, (February 16th, 1880,) delivered the judgment of the Court:—

The defendant, by deed, conveyed to the plaintiff the lands in question in this cause, and in the deed are contained the usual covenants of good title and warranty, but it appears that he had previously executed a mortgage deed of the same premises to others, who subsequently called upon the plaintiff for the amount of the mortgage and interest. He paid the amount without suit or eviction, or notice to the defendant, and brought this action to recover it from the latter.

At the argument it was contended that this action would not lie on the covenant without proof of eviction; but, with the view that I take of the case, it is not necessary now to decide that question or the additional one raised, as to whether or not the plaintiff could recover upon the common count for money paid, and I must confess that if it were necessary to decide these points I would prefer before doing so to hear

further and more exhaustive argument, after having examined cases bearing upon them, and not referred to by counsel, particularly American cases, some of which appear to be very conflicting. It will be conceded that as it does not appear that the defendant had notice of the mortgage encumbrance at the time he took delivery of his deed and had it registered, his title would have been perfect if the mortgage had not been registered before the registration of his deed. At the trial the mortgage was put in evidence, after the execution of it had been proved, but what purported to be the certificate of registry endorsed upon it was not proved to have been signed by the proper officer, nor was it tendered as evidence independently of the deed, which was, of course, executed some time before the certificate purported to have been signed. It was urged by the learned counsel for the plaintiff that it was not necessary either to prove that it was signed by the registrar or to tender it in evidence under Revised Statutes, chapter 79, section 18, which simply enacts that "the certificate of registry endorsed on any deed, docket of judgment or attachment, and *signed by the registrar* shall be taken and allowed in all Courts as evidence of the registry." This section appears to me only to make the contents of the certificate legal evidence, not when it *purports* to be signed by the registrar, but when it is proved as a fact to have been so signed.

In the last part of section 35, chapter 96, Revised Statutes, relating to witnesses and evidence, the section above referred to is re-enacted, and it is proper to read that chapter carefully to ascertain the intention of the Legislature. The general words of a statute are not to be construed so as to alter the previous policy of the law unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched. *Minet* v. *Leman*, 20 Beav., 269. In the chapter referred to the Legislature was exceedingly explicit when it intended to dispense with proof of seals, signatures, and the official or judicial character of parties authenticating copies of documents to be received in evidence. Section 27 provides that proclamations, treaties, judgments, decrees, orders, judicial proceedings, legal documents, etc., of any foreign State, or any British Colony, etc., etc., may be proved by examined copies, authenticated as thereinafter

mentioned. The section then provides that the authentication, to be evidence, shall *purport* to be signed, etc.; and afterwards, referring to judicial acts, it proceeds thus; "But if any of the aforesaid authenticated copies shall *purport* to be sealed or signed as hereinbefore respectively directed, the same shall be respectively admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." Section 28 provides that documents which are admissible as evidence in England, or Wales, or Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admissible here "without proof," (and I here quote the words of the statute,) "of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same." Section 30 provides for the admissibility of affidavits for the purpose of holding persons to bail in this Province, etc., *purporting* to be made before Commissioners outside of the Province. It also makes the several other documents therein mentioned evidence here, but the language used is exceedingly clear where it is intended to dispense with the requirements of the common law.

It will be borne in mind that these three sections to which I have referred, and which dispense with proof of handwriting, etc., refer solely to matters of evidence outside of the Province, or rather authenticated outside,—obviously, as I take it, from the necessity of the case, a necessity which does not arise in the present and similar cases. Let us now turn to section 29, which provides for receiving copies of papers filed in Courts *in this* Province, provided such copies be certified under the seal of the Court or by the proper officer, under his hand. Here no such word as "purporting" is used, nor are there any other words used which can possibly be construed as intending to dispense with proof of the seal or signature, etc. So it is when we come to section 32, referring to certified copies of

grants "duly certified," and section 33, of a grant or deed "certified under the hand of the registrar, or proved to be a true copy," etc., and section 34, referring to probate of a will, or copy thereof, "certified under the hand of the Judge or Registrar of Probate," etc. Section 36 makes a copy of a duplicate original of a grant, etc., evidence when certified by the Commissioner of Crown Lands, and section 37 provides that the certificate of the Prothonotary at Halifax on the plan of any township, etc., shall be presumptive evidence, etc. In all these cases referred to, providing for the admissibility in evidence of documents certified within the Province, not one word is said which could by any possibility be construed to indicate that the Legislature intended to dispense with the necessity of proof of the handwriting of the official, etc., while the contrary is the case in reference to certified documents coming from abroad and intended to be used in evidence here, and we cannot hold that proof of the handwriting of the Registrar of Deeds can be dispensed with in this case without at the same time holding the same thing in reference to the certificates of other officials under sections 29, 32, 33, 34, 36 and 37, already referred to. Section 31, however, referring to proof of registry of shipping, etc., gives in clear terms equal efficacy to the certificates of officials at home and those abroad so far as they refer to British ships, and, as I think, for very good and obvious reasons, which strengthen me in the view above expressed.

The plaintiff, in order to prove that he did not get the legal title to the property in question should, as the other facts stand upon the minutes, have shewn that the mortgage was registered before his deed. This I think he failed to do as the law requires, and I think there ought to be a new trial, at which the defendant will have an opportunity of setting up any legal or equitable defence that he may have. Under all the circumstances of the case, I think that the costs of this argument ought to be costs in the cause to abide the event of the suit.

ADAMS *v.* CITY OF HALIFAX.

THE Halifax Street Railway Company was incorporated by an act under which the City Corporation had power to refuse to permit rails to be laid, or to consent on such terms as they thought fit to impose. The Company discontinued their operations, leaving the rails in many places protruding above the level of the streets, and about a year after they had ceased to operate their road the plaintiff's carriage and horses were seriously injured in consequence of one of the rails projecting from the street, the wooden sleepers to which it had been bolted being too much decayed to retain the fastenings. Defendants pleaded that the rails were in the exclusive possession of the City Railroad Company, that the accident had been caused by the passage of a heavy cannon disturbing the rails shortly previous, and that they had no notice of their defective condition. The verdict was for plaintiff.

Held, that under the justification pleaded it was necessary for the defendants to disclose the permission given to the company to lay the rails, and that the question as to the immediate cause of the accident and the want of notice had been disposed of by the verdict.

Per YOUNG, C. J., that the defendant corporation was bound to cover up the rails after the company had withdrawn from the field, and was liable for the damage resulting from its neglect.

THIS was an action against the Corporation of the City of Halifax for injuries caused to plaintiff's horse and carriage, on Hollis Street, by the rails of the street railway, which protruded in such a way as to break plaintiff's carriage and injure his horse. The defences pleaded were that the city was not guilty of any negligence, that the rails which caused the injury were in the exclusive possession of the Halifax Street Railway Company, that the defective condition of the rails in question was caused by the carriage of a heavy cannon along the street shortly previous to the accident, and that the city authorities had no notice of the defect that caused the accident. The cause was tried at Halifax, in November, 1878, before Mr. Justice JAMES, who gave judgment for plaintiff for $150, subject to the opinion of the Court as to the liability of the defendant corporation.

The cause was argued March 10th, 1879, before SIR W. YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, J J.

Attorney-General, in support of rule.—The first ground I take is that there is no evidence to sustain the allegation in the declaration that the tracks were in the possession and under the control of defendants. Cites *City Laws and Ordinances*, p. 192; Acts of 1863, chapter 83. Section 5 of that act gives the exclusive construction, possession and maintenance of the tracks in question to the City Railroad Company, not conditionally. The law imposes simply the duty of keeping it in order. (WEATHERBE, J.—But suppose the rails are no

laid according to law, are they legally there? Could not the city step in and remove them?) No; except as a public nuisance. Chapter 99 of the Acts of 1870 prescribes a penalty to be imposed upon the Railroad Company for certain obstructions that might be caused by the improper construction or maintenance of the tracks. The Legislature allowed the city to part with the possession of these tracks and the highways upon which they are placed to the company. *Evans* v. *The City of Halifax*, 1 Oldright, 111, is in our favor. See also *7 Gray*, 421; *16 Pick.*, 170; *9 Gray*, 386. In the last case it was held that the consent authorized by statute, as here, of the Selectmen, corresponding to our City Council, was not the consent of the corporation, the inhabitants, and did not make the corporation liable.

Rigby, Q. C., contra.—The declaration is not based upon an allegation that the track was in defendants' possession, but that defendants were possessed of and had the control and management of the said public highway. Cites *City Laws and Ordinances*, p. 76, section 1; *Id.*, pp. 82 & 83, sections 272, 273, 279. These sections shew restrictions upon the breaking up of the soil of the streets, subject to which the railway charter was enacted. The word "exclusive" in the company's charter is not intended to "exclude" the control of the city, but to "exclude" other companies. (YOUNG, C. J.—Suppose the rails project, the city has no funds to appropriate towards building up the street.) Cites *Dillon on Municipal Corporations*, 796; *1 Redfield on Railways*, 561. The duty is on the town to keep the street in repair, whether there is a railway track there or not. Cites *Abbott's Dig. Corporations*, p. 534, sections 542–4; *1 Allen's Mass. R.*, 182. We must assume here that the Judge has found the defendants guilty of negligence, if there is any evidence at all of negligence. *L. R., 3 Q. B., Div.*, 327. There is evidence of negligence here. If the city consented to the putting of the track in the possession of the Railway Company, it was guilty of negligence; if it did not consent, then it was guilty of negligence in suffering the rails to be on the street for years.

Graham, in reply.—The city should not, in an action against it, be expected to prove consent on our part to the laying of the railway track, that was for plaintiff to prove.

If the consent makes us liable, however, we are willing to be held liable. Since the railway was constructed the Legislature has, by statute in 1870, recognized it as legally constructed. That makes sufficient proof of the consent, if proof were necessary. We are not liable as owners of the rails. The consent of the city to the laying of the rails does not make the city liable, because this accident could not have been foreseen as a consequence. The city is only liable for the natural consequences of the laying of the rails. *Wharton's Law of Negligence*, section 155. The municipal liability is statutable, and the city is liable only in consequence of an obligation to repair the streets. The liability is limited by the amount of funds assessed by law for that purpose. The city has no means provided for removing nuisances. We say we have repaired the streets. The city had no notice of the rail in question being defective. *Wharton's Law of Negligence*, sec. 961–2; citing *L. R.*, *2 Q. B.*, 264; also *Wharton*, section 999.

WEATHERBE, J., now, (February 16th, 1880,) delivered the judgment of the Court:—

A track, constructed with iron rails fastened to wooden sleepers, had been laid down in several streets of the city, upon which cars had been propelled by horses for several years. The running of cars ceased, and the track fell into a state of disrepair, and in Hollis Street the wood became rotten and the iron rails projected several inches above the street and became dangerous to passengers, horses and carriages, and, in fact, several accidents had happened, causing a good deal of damage. Plaintiff's hack, with horses, was passing on Hollis Street. An iron rail, bolted down firmly at one end, though exposed throughout its whole length, at the other end, where the wood was too much decayed to retain the fastenings, projected from the street in that part of the way where carriages ordinarily and necessarily passed, and caught the wheel, and, passing up through the bottom of the carriage, broke the springs, threw the driver upon the backs of the horses, one of which was permanently lamed by the accident, and damaged the hack to the extent of $84. This action for negligence was brought to recover the damage thus caused, and plaintiff recovered a verdict, on a trial before a Judge without a jury, for $150,

subject to the opinion of the Court on the grounds taken at the trial.

It was contended on the trial that the defendant corporation was not liable, because:—

1. The track was not in possession of defendants, but was under the control of the Halifax City Railway Company, incorporated by the Legislature of this Province.

2. There was no negligence in the manner in which the street was maintained where the accident occurred.

In the Act of Incorporation of the Halifax City Railway Company the Legislature protected the rights of the citizens by properly refusing to allow the persons engaged in that speculation to disturb the streets without the permission of the City Corporation, who had power to refuse altogether to permit the rails to be laid, or to consent only on such terms as they saw fit to impose. I think under the justification pleaded here it was necessary for defendants to have disclosed the permission given. We are not aware whether the consent—if there has been consent—was loaded with any condition, or whether, as counsel contended, the city is left to the restrictions imposed by the Legislature. A ground urged on the argument before us by Mr. Graham, for the city, may be first disposed of, namely, that the *immediate cause*, as might be gathered from the evidence, was the disturbance of the rail by the passage, at the instance of the military authorities, of unusually heavy gun carriages of the artillery, and that the alleged cause of damage was too remote. This, I should think, has been concluded by the verdict. However, in *Hill* v. *The New River Co.*, 9 B. & S., 308, the defendant allowed a stream of water to spout up in the road, at which plaintiff's horses took fright, and were damaged, with the carriage, by falling into a ditch carelessly left open by contractors for the construction of a sewer. It was contended that the remedy was against the contractors, but the defendant was held liable. It was held in *Burrows* v. *March Gas & Coke Co.*, L. R., 7 Ex., 96, where defendants were guilty of negligence in serving plaintiff with a gas pipe, though the immediate damage was caused by explosion from the gas fitter's imprudent use of a lighted candle, that defendants were liable. In *Collins* v. *Middle Level Comrs.*, L. R., 4 C. P., 278, in consequence of defective gates and sluices,

which defendants were bound by statute to keep in repair, proprietors of lands on the east closed the sluices to save their lands from damage by reason of the defect, whereby lands on the west were injured, and so the proprietors on the west, to save their land, re-opened the culvert and caused the injury. Defendants attributed the injury done to plaintiffs, who were some of the east proprietors, to those on the west, but the defendants were held liable.

By the Charter of the City of Halifax the duty is imposed on the corporation of keeping the streets in repair, and power is given to assess for the purpose, and the management of the streets is entirely within the control of the Corporation, under a Board.

In 1834 it was decided in the House of Lords, affirming the judgment of the Common Pleas and King's Bench, *2 C. & F.*, 331, that the Mayor and Burgesses of Lyme Regis, having accepted a Charter from King Charles I., of the borough, became legally bound to repair the buildings, banks and sea shore, and that, this obligation being one which concerned the public, an indictment would lie against them in case of non-repair and an action on the case for a direct and particular damage sustained by any individual. *Water Company* v. *Ware* was decided in the Supreme Court of the United States, 16 Wallace, 566. CLIFFORD, J., in delivering judgment, said; "It is settled law by the highest authority of the country from which the common law is derived that where it appears that the corporation is under a legal obligation to repair the way in question, and that such obligation is a matter of general and public concern, and also that the place in question is out of repair, and that the plaintiff has sustained some peculiar damage in his person or property by means of such defect or want of repair, that the corporation, if the means of performing the duty to make the repairs are within their control, is liable to compensate the injured party for the injury which he suffered from their neglect." And referring to the case of *The Mayor* v. *Henley*, he remarks that since that case was decided many decisions—of which a number are cited—to the same effect have been made by the State Courts approving that rule and applying it in all similar controversies. The law is thus stated by Dr. Wharton in his work, (1874,) on *Negligence*, p. 959;

"We must accept it as a settled and fundamental doctrine that where a municipal corporation is vested under the provisions of a charter granted at the request of citizens with the charge of roads, and accepts the charter, it is liable to parties injured for negligence in the defective construction or repair of such roads."

It was suggested on the argument that defendants were not bound to remove this nuisance,—as this old track was pronounced to be,—because they had no funds for the purpose. I then stated that if it were the duty to repair, I was unable to see how we could enquire as to the expenditure of the funds. When *Henley* v. *The Mayor of Lyme Regis*—the case already mentioned—was before the King's Bench, BEST, C. J., referring to the same question, said; "In such a case the Court would have to go into an enquiry how the funds had been employed, and it would be extremely improper to impose the necessity of such an enquiry on any Court. The learned Judge did perfectly right in rejecting evidence to such a point. The public have nothing to do with that. The plaintiff has nothing to do with that. As one of the public all he has to enquire into is who are liable to repair." This whole subject is obviously one of importance to the corporation.

It was contended this was a latent defect, and defendant corporation was not liable without notice. The law no doubt is that where a sudden and unforeseen defect occurs the town is not liable where they have no notice or having notice, reasonable precautions were taken. On this subject CLIFFORD, J., in the judgment cited, says; "Such a party cannot maintain an action against the corporation grounded *solely* on the defect and want of repair in the highway; but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured either in person or property in consequence of the unsafe and inconvenient state of the highway; as the duty to repair in such cases is a duty owed to the public, and consequently if one person might sue for his proportion of the damages for the non-performance of the duty, then every other member of the community would have the same right of action, which would be ruinous to the corporation, and for that reason it was held at common law that no action founded merely on the neglect to repair would

lie." It seems to have been upon the ground of the absence of all negligence or default in obtaining seasonable knowledge of the obstruction and the want of notice that the street was left by a third party in a dangerous condition, that *Evans* v. *The City of Halifax*, 1 Old., 111, so much relied on by defendants, was decided in favor of the city. I suppose that there must be either express notice of the defect, or it must be so obvious, continuous or notorious as to be easily observable. The action is founded on negligence. Here this cannot be said, I think, to have been an unforeseen defect. There is evidence that the negligence was continuous. Besides, after notice, there was great delay. And, further, this was a matter of fact disposed of by the verdict.

The foregoing disposes, I think, of all the questions raised at the argument, and I am unable to see any ground for disturbing the verdict. The rule must be discharged with costs.

SIR WILLIAM YOUNG, C. J.—On the special circumstances of this case I think the city must be held liable for the damage sustained by the plaintiff. The general principle I illustrated at some length in the case of *Ward and Wife* v. *The City*, in 1873, and acted upon it at the recent Sittings in *Corbin* v. *The Town of Dartmouth*, which the counsel for the defendants acquiesced in. The present case arose out of a defective rail, for which the railway company, under our own decision, would have been responsible, as I would have held, in the first instance, notwithstanding the doctrine urged upon us at the argument from *Dillon on Corporations*, section 796, and the American cases there cited. But the railway company had discontinued its operations and practically ceased to exist more than a year before the accident occurred, leaving the rails protruding above the level, and in numerous places exposing horses and vehicles to imminent danger. Under several clauses of its Charter in the Act of 1864, sections 264, 265, 278 and 279, the city and its officers are bound to keep the streets under their charge free of encumbrances and in good repair. What was their duty, then, when the railway neglected their duty which was equally incumbent upon them, and withdrew from the field. I think the city was bound immediately to have covered up the rails and to have brought the streets into a safe condition.

This they did, as appears by the evidence, to a considerable extent, but not wholly and upon system. Hence the protrusion of the rail which went through the bottom of the plaintiff's waggon and came up into the interior, damaging the wheel and cutting the horse's leg. The wood where the rail was raised was quite rotten, and would not hold the screws. It was turned up three feet high. This had not attracted the attention of Mitchell, who was employed by the Board of Works and saw the rails raised at several places in Hollis Street, where the injury occurred,—some were projecting a foot or eighteen inches, and sometimes more. Several he spiked down by direction of the City Engineer. The Engineer testified that the city covered the track wherever the road was very bad. He repeatedly spiked down and removed rails when reported to him, but never gave orders to cover them up. An equity suit by the city against the railway company was pending, which occasioned delay. A large gun carriage had passed over the rail in Hollis Street the day before the accident and curled up the end in a different block.

Under these circumstances we could not throw the loss upon the plaintiff who committed no fault and is entitled to our judgment. It is more equitable, more accordant with natural justice that such a loss should fall on the whole community than on the individual who has been injured without any fault of his own.

HARDY *v.* SMITH.

PLAINTIFF proposed on the trial to give in evidence a copy of a record alleged to have been filed March 13th, 1878, to meet a plea of *nul tiel record*. The Prothonotary of the Court, called by plaintiff, stated that no record of that date was to be found, and on cross-examination said the first record he had seen was filed August 18th, 1879, and that this was the first record that had been sent to him by the attorney whose duty it was to prepare it.

Held, that the Judge had properly rejected the evidence, and that he was justified in refusing to allow a record to be filed *nunc pro tunc*.

IN this case, tried before Mr. Justice JAMES, at Digby, the learned Judge directed a nonsuit. A rule to set the nonsuit aside was taken out on the ground that the Judge had rejected a copy of a record sought to be put in evidence by the plaintiff

to meet a plea of *nul tiel record.* It was alleged that this record had been filed in the Prothonotary's Office March 13th, 1878, but the Prothonotary, in his cross-examination, stated that the first record he had ever seen in the cause was filed August 18th, 1879, and that, he said, was the first record that had been sent to him by the attorney whose duty it was to prepare it.

Harrington, for rule.—The action was brought, and after a plea of *nul tiel record,* it was found that the record, proved to have been properly filed in March, 1878, had been lost. The filing and loss of the record being proved, secondary evidence should have been received.

Weeks, Q. C., contra.—The attorney who should have filed the record was J. M. Owen, of Annapolis, whereas it was filed by a clerk in the office of Wade & Viets, of Digby. The record could not have been properly executed even if filed. A record stands in a different position from any other paper. *Chesley, Admr.* v. *Bonnett,* 1 R. & C., 112—The only question is whether secondary evidence of a record can be given. I contend that a record proves itself, and not being on file, secondary evidence cannot be given; *Roscoe's N. P.,* 125; *1 Phillips on Evidence,* 390; *2 Taylor on Evidence,* 1291, 1294; *Arch. Prac.,* 436-7. First, the existence of the record must be established before other evidence can be given. Secondly, the proof must be given by the officer of the Court, and where he denies that any record has been filed it cannot be contradicted.

Harrington, in reply.—The presumption is that the record was properly executed; *Roscoe's N. P.,* 24. Where an ancient record is lost, it may be proved by parol or other testimony. The case of *Chesley* v. *Bonnett* is not applicable. There a record was admitted not to have existed, but was filed at the trial; *2 F. & F.,* 10; *Taylor on Evidence,* 1287, section 1535; also 3rd Ed., 1535, shewing a different rule.

DESBARRES, J., now, (February 16th, 1880,) delivered the judgment of the Court:—

At the trial of this cause before Mr. Justice JAMES, at Digby, the plaintiff's counsel proposed to give in evidence the copy of a record in the cause of *Henshaw* v. *Hardy,* which it was

alleged had been filed in the Prothonotary's Office at that place on the 13th of March, 1878. In order to lay the foundatian for this evidence Mr. Stewart, the Prothonotary of the Court, was required to make a search in his office for the original record, and, on being examined as a witness, stated that after a thorough search made therein no record in that cause, filed on that day, was to be found. On his cross-examination he stated that the first record in said cause that he had ever seen was filed on the 18th of August, 1879, and that, he said, was the first record that had been sent to him by the attorney whose duty it was to prepare it. The learned Judge refused to receive any evidence in reference to a document of the existence of which there was no proof, and also refused to allow a record to be filed in that cause *nunc pro tunc* in support of the plea of *nul tiel record* which it was admitted at the argument had been pleaded in this cause. The plaintiff having failed to produce a record which was considered essential to establish his case, the learned Judge directed a nonsuit, which is sought to be set aside on the ground of the improper rejection of the evidence offered to which I have referred. To have allowed the copy of a record to be put in without proof of the original, and the loss or destruction of it, would have been an anomaly. To have allowed a record to be filed, *nunc pro tunc*, in the midst of a trial would have been contrary to all the decided cases and the practice of the Court while the plea of *nul tul record* was outstanding, and it would have been an act of injustice to the defendant which no Judge would permit. See *Phillips on Evidence*, 129; *Taylor on Evidence*, 1535; *Stark.*, 183; *4 Camp.*, 372, section 1; *1 Arch.*, 125.

I think the learned Judge was right in ordering a nonsuit, and that the rule *nisi* for setting it aside ought to be discharged with costs.

IN RE SIMON FRASER.

BY an Act of the Provincial Legislature a Town Court was constituted for the incorporated Town of Truro, to be presided over by the Recorder or Stipendiary Magistrate, the two offices being filled by the same person. It was enacted that the Town Court should have and possess all the powers in civil matters within the municipality conferred upon one or more Justices of the Peace or Stipendiary or Police Magistrate by an act of the Province. The prisoner was convicted of a violation of the License Laws by selling intoxicating liquors contrary to law, as for a third offence, and while in jail was again convicted of a fourth offence, the summonses issuing out of the Town Court, and the executions, in the form R. S., chap. 75, schedule F, being signed by the Stipendiary Magistrate as the officer presiding in that Court. On a motion for a *habeas corpus*,

Held, that the matter came within the jurisdiction of the Town Court as above defined, and that the imprisonment was lawful, although the execution specified no definite period.

WEATHERBE, J., dissenting.

THIS matter came before the Court on a motion to make absolute a rule *nisi* granted by Mr. Justice WEATHERBE, under chapter 99 of the Revised Statutes, "Of Securing the Liberty of the Subject." The prisoner Simon Fraser had been convicted before F. A. Laurence, Esquire, Stipendiary Magistrate for the town of Truro, of violating the license laws in force in the town, and was fined forty dollars and costs as for a third offence. Execution was issued in the form given in the Revised Statutes, chapter 75, under which Fraser was committed to jail. While there he was convicted of a fourth offence in the sum of eighty dollars and costs, and was detained under an execution in the same form. The grounds taken in the rule *nisi* for the prisoner's discharge were as follows:—

1. Because said gaoler had no sufficient warrant or authority to detain the said Simon Fraser.

2. Because there are no returns on the executions under which he is said to be held showing that the said Simon Fraser at the time of his arrest had no goods.

3. Because the said executions are void in that they do not set out or disclose a valid conviction or state the period of imprisonment to be undergone in default of non-payment of the fine.

4. Because the said Simon Fraser was illegally arrested, in that he had sufficient goods whereon to levy.

5. Because the Town Court of Truro has no jurisdiction to try causes under chapter 75 of the Revised Statutes, relating to the sale of intoxicating liquors, or to adjudicate upon criminal offences.

6. Because the said Frederick A. Laurence had no power or authority to issue the said executions.

7. Because the proceedings are void in that they were taken and carried on while the said Simon Fraser was in custody and unable to attend at the trial.

This rule came on for argument this term before SIR WM. YOUNG, C. J., DESBARRES, JAMES and WEATHERBE, JJ.

Sedgewick for rule.—The first ground on which Fraser must be discharged is that the Town Court of Truro had no jurisdiction to try breaches of the license law. The act of incorporation, Acts of 1875, chap. 47, sec. 37, delegated to the Council power to create a police and municipal court, but there was nothing said about jurisdiction. By the Acts 1876, chap. 49, sec. 5, a court was expressly created having civil jurisdiction, and it was under this that the jurisdiction to deal with the present case and others similar to it was sought to be upheld. Under the first act by-laws were passed creating a court. The by-laws were passed before the passage of the act of 1876, which refers to them. They were approved as required. The by-laws provide for the prosecution of breaches of the license law in the police or municipal court of the town at the suit of the town. There is no such thing as the "civil" court of the town. The same statute which confirms the by-laws determines the jurisdiction of the court. The by-laws are made valid only so far as they are not inconsistent with the act or any other law. The act of 1876 simply legalizes by-laws which the Council had power to make before. Selling liquor without license is clearly and unquestionably a crime or at least a misdemeanour; *4 Blackstone*, 314; *Broom & Hudley's Com.*, 3. It is held to be a civil matter because under the License Law, R. S., cap. 75, sec. 23, the procedure is the same as in the case of private debts. If ever there was a *non sequitur* this is one.

There are two commitments here. The first is clearly illegal as it does not specify the offence; *Revised Statutes*,

354; also p. 347, sec. 23. It is absolutely necessary that the offence of which the party was convicted should be stated in the commitment. The forms given in this statute can refer only to penalties where there is no imprisonment. The statute speaks of the payment of money only. The form is that of an ordinary execution and cannot apply. The form in the statute could not possibly apply to section 35. Upon a close study of the license law over twenty specific acts are declared illegal. They all come under three divisions; 1st. Those punishable by fine only; 2nd. Those punishable by fine *or* imprisonment; 3rd. Those punishable by fine *and* imprisonment. Section 23 provides for the recovering of penalties under the first class only and cannot apply to the others. The form of execution given in the statute is clearly not adapted to the offence specified in section 35, providing for fine *and* imprisonment in certain cases. We must therefore go to the common law for forms of procedure to apply to the two last classes of offences.

There is nothing in the commitment specifying the amount of fine or length of imprisonment.

Russell on Crimes, 49, shows that where an offence is created by statute an indictment will lie, &c. The doing of a thing forbidden by statute is indictable. They can proceed by indictment or before the magistrates, using common law process; *1 Arch. Crim. Pr.*, 60.

The defendant cannot be convicted of this offence unless he is personally present. If it be a criminal case we must go back to common law. All offences were tried by indictment and the defendant had to be present.

Attorney-General contra.—The proceeding is from the first a civil one. That extends not only to the form of proceeding, but covers the question of jurisdiction: *9 A. & E.*, (N. S.,) 691. This case shows that matters which are prohibited, and to the doing of which penalties are attached, are not criminal but civil proceedings. (WEATHERBE, J.—Is it a civil matter when it is put down for the public good, and where no private person has an interest? If it were not for the statutory procedure there would have to be an indictment.) Where a matter is prohibited by statute and a penalty affixed it may be a civil proceeding, and in this case it is;

2 Bos. & Pul., 530, note on p. 532. This was a prosecution for keeping false weights. It was a suit for the penalty and it was held to be a civil proceeding; *King* v. *Myers*, 1 T. R, 265. This was the case of a penalty for keeping lotteries, of fine or imprisonment, and was held to be a civil proceeding and analagous to a *fi. fa.*, where the body is taken in default of goods. (WEATHERBE, J.—I observe the word "conviction" is used both in civil and criminal proceedings.) He was arrested on Sunday and discharged on the ground that it was a civil proceeding, and that as it was such he could not be arrested on that day. (WEATHERBE, J.—Is there any power in those cases you have cited, as in our statute, to sue as for a debt.) Cites *22 Geo. III.*, chap. 47, secs. 6, 7, 10 and 14. The section of our act under which the penalty is recovered is the 24th. One-half the penalty is to go to the informer and the other to the king.

The procedure prescribed by the statute is of a civil nature; *3 Stephen's Com.*, 551. (WEATHERBE, J.—If it were a thing altogether prohibited I think it would be different, but the Legislature has said liquor may be sold and has regulated the manner of sale.) *Stephens* classifies among civil injuries offences against penal statutes. See p. 3 R. S., Interpretation Act, sec. 8, as to mode of recovery of penalties as a private debt where no other mode is prescribed. If the mode of recovery prescribed in the Act does not extend to all the penalties, including that in section 6, this general act comes in and provides substantially the same remedy. (WEATHERBE, J.—I think it must be conceded that if section 8 of the Interpretation Act applies you have just as good an argument to show that section 23 of chapter 75 applies.) I think that section 23 does apply, and gives us specifically the very remedy we have adopted. *3 Allen, N. B.*, 122, shows that the remedy by action of debt is cumulative. That was a conviction for selling liquor contrary to the Act. There was a penalty of fine and imprisonment. It will throw light on the matter to examine the License Act as passed some time ago. It is provided that no person imprisoned shall be entitled to jail limits. That is a right incidental only to civil proceedings. Revised Statutes, 2nd series, went a step further, and said the act for the relief of insolvent debtors should not

apply. This is now struck out and that act applies; *R. S.*, 2nd series, p. 77.

As to objections to form of execution, see *1 D. & R.*, 156; *1 L., M. & P.*, 16. If the execution is irregular it is merely irregular, and the prisoner is not entitled to his discharge. They are applying for the discharge without making any tender. If it is a civil process the execution is amendable. A defect in the execution in not reciting the conviction is not ground for a *habeas corpus*. (See cases already cited.) In the latter case the warrant of commitment was attacked on several grounds, but ERLE, J., held it to be valid.

As regards the jurisdiction of the court the Town Court has jurisdiction over civil proceedings, but apart from that, Mr. Laurence, who issued the summons, was a Stipendiary Magistrate. *(Sedgewick.*—That was not the case.) The executions were signed by Laurence and it was recited that he tried the case. *(Sedgewick.*—He is Stipendiary for the town.) They cannot go behind the conviction and execution and say that the summons was issued by the town clerk without resorting to *certiorari*. The statute in reference to stipendiary or police magistrates, is on p. 96 of the Appendix to R. S. The Town Council has power to appoint a stipendiary magistrate and town clerk, officers who are elsewhere appointed by the Sessions. He has the jurisdiction of two justices of the peace. In *Keefe* v. *McLennan*, 2 R. & C., 5, it was held that the provisions of this chapter were police regulations. *Paley on Convictions*, 421. At the time the rule in this case was granted he was held under a distinct proceeding which was not attacked.

Graham, (with Attorney-General).—I think this is a penalty as provided by section 6, and can be recovered. The Legislature have gone further and said that these penalties are to be recovered in this way. (WEATHERBE, J.—The summonses should be here. I think we should make an order to have them produced.) They were not necessary for us. The other side should have brought them if they were required.

My first ground is that the Legislature expressly intended that the money penalties under sections 2 and 6 should be collected under section 23. Section 23 applies expressly to these as will be seen on reference to the form. A admit that

there must be another mode in regard to the imprisonment. Perhaps this process would not apply to that. The form of conviction will not cover any other penalty than the one we are seeking to recover. Where there is an act and cases decided by the court, then the Legislature again deal with the matter, they will be held to have done so in view of the cases. Section 23 recognizes form D, which was in the second and third series of the Revised Statutes, and form D covers this penalty for selling intoxicating liquor without license. (WEATHERBE, J.—Cannot form D be used for the punishment by imprisonment?) Yes, but not under this particular process, where you sue as if for a private debt. (WEATHERBE, J. —How will the punishment be inflicted?) It is not necessary for me to say. Either it is nugatory altogether or you have to resort to another process. As long as I can collect the money penalty under section 23 I am not driven to consider the other point. There are none of the other offences to which form D will apply. Section 6 is the only one in which offences are graded and punishment provided for subsequent offences. The remedy in this case is clearly a civil one. It all depends upon the intention of the Legislature. If this were a crime a married woman or servants or other persons would be liable. If not a crime they would not be liable, and there being no way of coming at them the Legislature found it necessary to enact that they should be liable. (Sec. 21.) So with reference to the jail limits and the Insolvent Debtors' act. In *1 C. & J.*, 226, the distinction between civil and criminal proceedings is drawn.

Section 25 regulates appeals, and section 36 the proceedure. The latter section says it will not be necessary to give particulars in the writ as in the ordinary civil suits. The procedure is especially directed to the recovery of money. Under the revenue laws there are two kinds of penalties clearly laid down and where it is intended to be a crime it is clearly said so. As far as section 23 goes it has nothing to do with the imprisonment. (WEATHERBE, J.—I think the imprisonment could be easily put in the conviction. Then execution would issue for the amount mentioned.) A conviction would be bad if put in the alternative. (WEATHERBE, J. —If it were such a fine, and in default thereof?) That would be good. When forms are prescribed they must be followed.

If there is one good cause of detention he cannot be discharged; *Paley on Convictions*, 414. At the time the order was granted in this cause there was one good cause of detention; *Ibid*, 344.

Mr. Sedgewick objected that when the second conviction took place the defendant was not present. There is no provision for compelling him to be present, and he could defeat a conviction by absenting himself if that ground were tenable. *The Queen* v. *Simpson*, 10 Mod., 341, shows that a party can be convicted in his absence. On this point see also *Paley*, 102. The law I cited shows that where there is no warrant to compel the party to appeal, as in this case, you can proceed *ex parte*.

Sedgewick, in reply.—Cites *Cochran's Reports*. 82.—The statute giving the court jurisdiction does not enlarge their jurisdiction, but merely gives what they had before. Jurisdiction must be given expressly, and not by inference. The whole question turns on what is a civil matter. The Legislature prohibits an act which is then committed. That is not a civil matter. In the case in *Lounds, Maxwell & Pollock*, the Judge distinguishes between a civil and a penal proceeding. You may proceed civilly for a penalty for a criminal offence. In the cases cited there was merely a pecuniary penalty in every instance. If a common informer proceeded for a penalty, even in a criminal matter, it would be a civil proceeding. (WEATHERBE, J.—Where is the crime here?) The Legislature has made it a crime for anyone to sell liquor without license. Take any section out of the criminal acts of Canada where persons are punishable by fine or imprisonment,—are they civil matters? (SMITH, J.—Those acts are made criminal distinctly.) What is the distinction? There is no distinction between doing an act prohibited by a Dominion and an act prohibited by a Provincial enactment.

SIR WILLIAM YOUNG, C. J., now, (February 16th, 1880,) delivered the judgment of the Court:—

This is a rule *nisi* granted by a Judge under chapter 99 of the Revised Statutes, section 3, which was fully and ably argued during the present Term. It appears by the affidavits adduced on both sides and the return of the gaoler that Fraser

was convicted on the 11th of October last, in the sum of forty dollars and costs, for violati ng the License Laws, being for a third offence, and, under an execution in the form given in schedule F, chapter 75, Revised Statutes, was committed to gaol on the 16th of November. While there, on the 3rd of December, he was convicted for a fourth offence of the same character in the sum of eighty dollars and costs, and is detained under a like execution. We have given judgment this Term in three other cases of parties convicted of like offences, and the strife, I may say, now raging in the Town of Truro has led to a thorough examination of the character and bearing of our License Laws. And the first and most material question is, are these convictions to be regarded as criminal proceedings or as civil matters, triable by the Court constituted at Truro, under the amending Act of 1876, chapter 49. An exhaustive judgment of the County Court, upholding them as civil matters, has been reported, and affords us valuable aid in considering a point so warmly contested, and which we have now to review.

It was argued that a violation of the License Act was an indictable offence, and the definition of a crime by Blackstone was relied on, "that a crime or misdemeanor is an act committed or omitted in violation of a law either forbidding or commanding it." But this is one of the definitions of the great commentator that has been questioned, and *Stephen* says, 4 Com., 55, that it scarcely points out the difference between a crime and a civil injury. *Russell*, in his work on *Crimes*, says, (I., 66.); "Where the statute making a new offence is not prohibitory, but only inflicts the forfeiture and specifies the remedy, an indictment will not lie. Where the offence was punishable before the statute prescribing a particular method of punishment, then such particular method is cumulative, and does not take away the former remedy, but when the statute only enacts that the doing of any act not punishable before, (which is exactly the case here,) shall for the future be punishable in such and such a particular manner, then the particular method prescribed by the act must be specifically pursued, and not the common law method of indictment." So also in *Archbold's Criminal Proceedings*, 14th Ed., fol. 2, it is said; "If the manner of proceeding for a penalty be contained in the same clause, (or chapter,) which

prohibits the act, the mode of proceeding given by the statute must be pursued and no other, for the express mention of any other mode of proceeding impliedly excludes that of indictment." *R.* v. *Robinson*, 2 Burr., 805; *R.* v. *Buck*, 1 Str., 679. On these authorities, which no modern case has shaken, independently of the well-known distinction between *mala prohibita* and *mala in se*. *1 Stephen*, 36–39, I can have no doubt that a violation of our License Act is not an indictable offence, and can be prosecuted only in the mode prescribed by the act. I am speaking not in a moral point of view, with which we have nothing to do here, but in the legal point of view, which at present commands our attention.

Section 23 of the act directs in what way penalties under chapter 75 may be recovered, and gives in schedule F but one form of execution, which is not applicable to all the penalties in the several sections, as, for example, to section 35. This is an omission in the act, which the Legislature provided for in 1865, in the case of railways, by the 28th Vic., chapter 11, the 3rd section of which, amending the then License Act, directs the issue of a warrant to commit a person violating the law to jail until the fine imposed on him and the costs shall be paid, but in no case for a longer period than three calendar months. A clause somewhat similar to this would cure the defect in chapter 75. Admitting the defect, however, it by no means follows that it invalidates a proceeding that does not come within it. Section 6 of the act, under which these convictions were had, is by no means so obscure as it was represented to be at the argument. For the first offence the penalty is ten dollars, or imprisonment for twenty days in the event of non-payment of the fine; for the second offence twenty dollars or forty days' imprisonment; for the third offence forty dollars or eighty days' imprisonment; and for every subsequent offence eighty dollars or three months' imprisonment. Much was said about perpetual imprisonment, about the person with whom the alternative of these punishments lay, and the application of the Insolvent Act, recognized in the second series, but not in the first, third, or fourth. These enquiries and doubts are all met by what I hold to be the clear, unmistakable meaning of the 6th section of the act. Each of the three last imprisonments depends on the same contingency as the first, and they

are imposed only, as in the act, also, of 1865, in the event of non-payment of the fine. The penalties are money penalties, and the non-payment is visited with increasing and fixed periods of imprisonment which can neither be diminished nor extended on a sound construction of the law, nor mitigated, under section 38, by admission to the limits. The form of execution, schedule F., was introduced for the first time in the 3rd series, and, serving the purposes of a warrant, being legalized by the act, is to be favorably regarded by the Court. In this view some of the cases cited at the argument apply. I shall refer to these and one or two others briefly.

In the *King* v. *Rogers*, 1 D. & R., 156, the writ of *habeas corpus* was refused. The committal was for two months unless the money was paid. The warrant, said the Court, was not to be looked to with the same strictness as a conviction, and it was added; "If the defendant pays the money to the jailor, he will be forthwith discharged." In *Ex parte Pardy*, 1 L., M. & P., 21, there was a warrant of commitment to which many objections were taken. ERLE, J., said; "If it were in the nature of a conviction it might be bad, but it is in the nature of a civil execution, for the defendant may at any time pay the debt and costs and release himself from the consequences of a refusal or neglect to pay. The jailor is bound to know when he ought to discharge him." "I look upon it," the Judge added, "in the light of partly a civil and partly a penal proceeding." In *Ex parte Hartt*, 3 Allan's New Brunswick Reports, 122, it was held that in an action for debt for selling liquors without license a summary conviction was good enough, though not in the form given by the act. And in our own Court in *McCully* v. *McKay*, Cochran's Reps., 82, a conviction under the act was upheld, though some words were omitted in the form, as being substantially good.

In the light of these decisions, before what tribunal and in what form are such offences to be prosecuted? By the Act of 1876, chapter 49, two Municipal Courts are constituted in the incorporated Town of Truro, the Town Court, presided over by the Recorder or Stipendiary Magistrate, the two offices being now filled by one and the same person, and the Police Court, which has no part in this inquiry. The 5th section enacts that the Town Court shall have and possess all the powers in civil

matters within the Municipality conferred upon one or more Justices of the Peace, or Stipendiary or Police Magistrate by any act of the Province of Nova Scotia, or hitherto exercisable or held by them or him. The view which I have taken of the proceedings brings them within this clause. Section 23 of chapter 75 directs the penalties to be recovered in the same manner and with the like costs as if they were private debts. And the by-law of 5th of March, 1878, approved by the Governor-in-Council, and having the force of law under the Act of 1876, section 13, recognizes the jurisdiction of the Town Council over offences in violation of chapter 75. The form of the summonses is not annexed to the convictions before us in these two cases as they ought to have been, but there is no doubt that both summonses were taken out of the Town Court, and both convictions signed by the Stipendiary Magistrate, as the officer presiding in that Court. Had the convictions proceeded from the Municipal Court mentioned in the by-laws under the Act of Incorporation in 1875, we could not have sustained them, but the Town Court, in the Act of 1876, is duly established, and supersedes the Municipal Court in No. 4 of these by-laws. The difficulty, as it appears to me, has arisen out of a misapprehension of the scope and meaning of the words "convicted" and "conviction," in the License Law, chapter 75. It was argued that a conviction necessarily and exclusively applies to a criminal offence, punishable as a misdemeanor, and the proper subject of an indictment to be enforced by a warrant. Now, it may be conceded that this is the sense in which it is often understood, but not always so. *Bouvier*, in his *Law Dictionary*, (2nd Ed.,) says; "This word means a condemnation. In its most extensive sense it signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means a judgment given against a criminal." It is obvious that the Legislature meant a conviction for penalties under chapter 75 in its extensive sense, otherwise they would never have perpetrated the absurdity of making them recoverable in the same manner and with the like costs as if they were private debts, and giving the form, not of a warrant, but of an execution. But this would have been worse than an absurdity, for if a proceeding following the statute is illegal, every magistrate who has so

an offender against the License Law to jail is liable to an action or false imprisonment, and of such actions the Town of Truro would presently furnish us with an abundant crop.

In the present case, adopting the view of BAYLEY, B., in *1 B. & J.*, 226, the investigation we have had leaves no reasonable ground for doubt. A distinction was made between the first and second convictions which is of no consequence here if either of them was good; and to the preliminary steps in both the principle of *omnia rite acta* applies. The affidavits shew clearly that a third and a fourth offence against the License Law were committed and proved, and having been punished in conformity with the law, the defendant must remain in custody, and the rule *nisi* for a *habeas corpus* must be discharged. If the jailor refuses or neglects to release him at the proper time, a writ of *habeas corpus* will issue as of course.

DESBARRES, J.—I was present at the argument, and have devoted as much time as possible to the consideration of the case. The impression which the cases have made on my mind is the same as that of His Lordship the Chief Justice. The forms given in the License Act are certainly not the best, as no punishments are prescribed to which the forms do not apply. Still, I think that in this particular case the execution may and must be held to be sufficient. I am glad that I have been able to come to this particular conclusion, as, if, through any defect in the form, we were obliged to decide that the whole proceedings were wrong, the consequences must have been most disastrous. I may be wrong, but if I am, I have the satisfaction of knowing that there is a tribunal by which I may be set right.

JAMES, J., concurred.

WEATHERBE, J., read the following dissentient opinion:—

This is an application to us under cap. 99 of the *Revised Statutes*, (4th series,) "Of securing the liberty of the subject," by which we are required to examine into the legality of the imprisonment of one Simon Fraser, convicted under cap. 75 R. S. for illegal sale of intoxicating liquors.

I think the prisoner is illegally detained, and ought to be discharged.

There are, I think, fourteen clauses imposing penalties for violation of the Act. In nine cases they are money penalties alone. In one instance the punishment is by fine and imprisonment, and in four instances by fine or imprisonment. The case before us is of the latter sort. The proceedings against the prisoner are for the penalties imposed by sec. 6 for violation of sec. 2, which prohibits the sale without license. Sec. 6 is as follows:

"The penalties for violating the law relating to the sale of intoxicating liquors shall hereafter be; for the first offence, ten dollars, or imprisonment for thirty days in the County or district jail in the event of non-payment of the fine; for the second offence, twenty dollars, or forty days' imprisonment; for the third offence, forty dollars, or eighty days' imprisonment; and for every subsequent offence, eighty dollars, or three months' imprisonment."

In each case here there is to be imposed the fixed money penalty, or imprisonment for a limited time in case of non-payment. There are two convictions before us under which the prisoner is detained. On the face of the first conviction and "execution" there is a defect which does not appear in the second case, which, in other respects, is similar. I will deal with the second conviction, which will dispose also of the other. The penalty under the statute for a fourth offence, for which this conviction is made, is $80, or imprisonment for three months in the County jail in the event of non-payment of the fine. The non-payment of this $80 cannot be visited with a period of imprisonment greater than that mentioned, viz., three months; and the prisoner in this case should, at the end of that period of imprisonment be entitled to his discharge. Neither in the conviction here attacked, nor in the process by by which the prisoner is arrested and detained, nor any where is there any mention of the three months, or any other period of imprisonment, either directly or indirectly. And as we are all agreed that, in the event of the non-payment of the money penalty no greater period of imprisonment than the three months should be imposed, and as I am entirely unable to see how the gaoler is to know when the prisoner ought to be discharged, I thought that this was conceding all that his counsel had any difficulty in urging before us.

One main argument for the prisoner was that neither the conviction nor the process for arrest showed that the Court had adjudged, as the statute required, that for this fourth offence the prisoner should, in the event of the non-payment of the fine, *be imprisoned in the county jail for three months*; that, in fact, the proceedings are everywhere silent not only as to imprisonment but as to the *time* and *place* of imprisonment limited by the Legislature, and the prisoner, therefore, could not know, and that the jailor could not ascertain, (as we all, I understand, think, and all the authorities show he ought to be enabled to see), when he ought to discharge him. The conviction, however, here, under this 6th section of the act, is made for a money penalty alone, as in the cases of the 14th, 15th, 16th, 17th, 18th, 20th, 29th, 30th or 33rd clauses, where no period or place of imprisonment is mentioned or limited. It is clear enough that the Legislature did not intend that under section 6 the conviction or punishment should be the same as where a money penalty alone has been fixed, or that alone would have been imposed. Here is the conviction complained of:

"The within named defendant having been duly summoned, as mentioned in the annexed writ of summons, was this day convicted of the offence of violating the license laws by selling intoxicating liquors without license; *said conviction being for the fourth offence, and is made after trial upon the oath of Ellen Davis. The witness examined at said trial was Ellen Davis. Penalty adjudged, upon conviction, eighty dollars and costs,—four dollars and thirty cents.*

"Witness my hand this twenty-sixth day of November, A. D. 1879.

(Signed) F. A. LAURENCE,
Stipendiary Magistrate,
Town of Truro."

We are not to inquire here into the merits of the judgment, —and I need cite no authority for this,—we are to see whether the court or magistrate had jurisdiction of the subject matter, and whether, on the face of the proceedings, the conviction and imprisonment were pursued within the exercise of that jurisdiction. If there appears a want of jurisdiction, or if the proceedings are not in accordance with law,—in either case the

prisoner must be discharged. The question of jurisdiction will be disposod of directly.

It was contended that the form of conviction made applicable to a suit for penalties under this chapter by section 23, (which also empowers any one to sue for the same in the same manner and with the like costs as if they were private debts,) precluded the propriety of following the statute, or adjudging anything more in the conviction than the amount of money penalty and costs, and it was argued that, in consequence of this incongruity, the statute must bend to and fit the form; or, in other words, that the fine and costs alone, at the option of the informer, might be pursued, and that the court or magistrate below was empowered to abandon the forfeiture or imprisonment, which the Legislature has fixed in the alternative as the punishment, altogether, as if it were not in the statute. No authority was cited in support of this doctrine; and, as I think, upon principle, in case it becomes a question whether the statute or the form should yield, the latter must, beyond all question, give way, I cannot in any way favor this reasoning. This, it appears to me, would be subverting the plain and positive enactment of the Legislature to a fanciful mode of meeting the alleged difficulty of construction. But I see no difficulty whatever as to the form of conviction. The form is ample to give effect to the law, as I thought, and suggested at the argument. The very directions printed in italics in our form require a statement,—and every authority supports this element in a conviction,—of the manner of the conviction. What was to have prevented the magistrate from adjudging '*that* (see the statutable form in *Archbold's Crim. Prac.* 61, somewhat similar to this,) *said defendant, for his said offence, being a fourth offence, do forfeit and pay the sum of eight dollars penalty and $4.30 costs; and in default of payment of said penalty to be imprisoned in the County jail of the said County of Colchester at Truro for the space of three months*'? This would have left no doubt what the judgment of the Court was in the event of non-payment of the fine. This the Court has failed to do, and the judgment has not, (it seemed very clear to me,) been in accordance with what the statute required. It was not necessary for prisoner's counsel to argue that now the imprisonment is perpetual, although

thought, if he was to be detained, it must be perpetual. Has the conviction fixed the imprisonment according to the statute? If not, who is to fix that? When and how is it now to be fixed? It is necessary, say the authorities, for the Justice to set out the offence, whether the party appears, the manner of proof, and the mode of conviction, with the penalty or forfeiture imposed, in order that we may see, with the statute before us, clearly, whether he had jurisdiction and had properly exercised it, and so that it may ever afterwards appear what has been done. As I think this conviction clearly bad, and one upon which no commitment, execution or warrant could be founded, it is unnecessary for me to discuss the validity of the "execution," as it is called, upon which the commitment to jail has taken place. I may, however, add that if the form is not sufficiently elastic to impose the penalty exactly and precisely as it is required by the statute, then it cannot be used, and was not intended to be used. All conflict would end by applying the "execution" only to clauses imposing a money penalty alone, which should be pursued as a debt; and the cases show that where a conviction is imposed by statute and no form of warrant is given, the process may be framed in accordance with the requirements of the common law. What, may I ask, is to be done where fine *and* imprisonment are imposed? Is that to be "sued for as a debt"? It is quite evident how the alleged defect occurred. This is the original form, and was in use for a long period, when the penalty was merely a money penalty. Afterwards the punishment was altered by the Legislature, and the imprisonment was added as the alternative in the event of non-payment, but no new form of execution or warrant was substituted. But our statute specially authorizes the alteration of forms, (*R. S.* cap. 1, sec. 12.) There is a blank in the form of execution, in which,—if this form is available,—I think the conviction should be recited, and in that case the term of imprisonment which the Court was bound to adjudge would appear. I need not decide whether in that case, with the words "until discharged by due course of law" in the latter part of the form, the process would operate in the hands of the jailor to discharge the prisoner at the end of the period of three months. I have not a doubt that nothing short of that would so operate, for I

cannot suppose so great an absurdity as that the jailor is to search and construe the statute, or to apply to the Court,—which would require notice and re-hearing,—to know when the prisoner is to be released. All this depended, it appeared to me, upon first principles. Authorities were cited at the argument to take the case out of the ordinary rule, but an examination of these cases, I am convinced, affords support to the prisoner's application.

In the *King* v. *Rogers*, 1 D. & R., 156, defendant was summarily committed for non-payment of a fine of £5 for not having satisfactorily accounted for naval stores in his possession in violation of the statute, and in default of payment to be imprisoned for two months. The statute did not require a form of conviction to be drawn up and signed, as in the case before us. One-half the money was to go to the receiver, under the act, and the other to such person as the justices should direct. The only objection taken was that this was not in the commitment, and ABBOTT, C. J., said; "The difficulty I have is in subjecting this warrant of commitment to the same rules of construction which are applicable to convictions. We are bound to presume, until the contrary is shown," (as it is clearly shewn in the case under consideration), "that there has been a good conviction, and that the magistrate has done everything required of him by law. * * * * * *"

He further says; "If the defendant pays the money to the jailor he will be discharged forthwith." If he should not pay his time was limited in the commitment, as it is not limited here.

In the *Attorney General* v. *Siddon*, 1 Crom. & Jer., 220, 20, there was a suit by information for penalties in the Exchequer Court, for concealing smuggled tobacco. The evidence showed that the offence was committed by the servant of the defendant without his knowledge, and there was a motion for a new trial. It was not denied that this was a criminal matter, but it was contended that a remedy by information for penalties was in the nature of a civil remedy to recover a debt due the Crown. I suppose this is similar to cases instituted in our Supreme Court on the information of the Attorney General of Canada for the recovery of penalties. ALEXANDER, L. C. B., said; "The argument, in some measure proceeds upon

notion that this is a criminal proceeding. For some purposes, unquestionably, this proceeding has received a narrow construction, because it resembles in some respects a criminal proceeding, but on the other hand it is said to be a civil demand of the Crown. Without entering into that question I think that the doctrine of responsibility applies to this case."

BAYLEY, B., and VAUGHAN, B., considered the proceeding not properly a criminal proceeding, though a penal proceeding and a civil proceeding for recovering a debt due the crown.

In *Ex parte Pardy*, 1 L. M. & P., 118, there was a judgment of debt against the party in the County Court, and an order that he should pay it with costs. He was committed to prison for forty days by a warrant under the provisions of the County Court Act, and upon examination it appeared that the debt had been fraudulently contracted, and he had fraudulently transferred his property. The case is very similar in principle to a remand under our Provincial Insolvent Law, which I should have supposed was a purely civil proceeding. The warrant was attacked for alleged defects, and ERLE, J., who refused to discharge the prisoner, said; "If the warrant of committal now under consideration were in the nature of a conviction it might be bad." One ground urged was that the warrant required the jailor to keep the defendant for forty days, or until he should be sooner discharged by due course of law, when it should have been until he should pay the debt and costs, so that the jailor might know when he was entitled to discharge him; and ERLE, J., though he regarded the warrant partly in the light of a civil proceeding, said; "The jailor is bound to know when he ought to discharge him,"—that is, bound to know from the face of the warrant. In *Ex parte Hartt*, 3 Allan N. B. Reps., 122, the conviction was held bad because the amount of costs was not ascertained by the Justices and specified in the conviction.

Another ground taken was the want of jurisdiction, and whether the statute has been satisfied or not, and upon the ground that the Court below had no jurisdiction, I was at a loss to know how the prisoner could be detained. It is admitted the Court only has jurisdiction in "civil matters," as will be seen when I refer to the act. It is said this is a civil matter, and in that way was properly tried by the "Town

Court" of Truro. On the other hand it was urged that whether a misdemeanor and indictable, or only a penal matter, *it was not a "civil matter."* The question arose whether, under section 2 of our act, the offender might be proceeded against by indictment. In *Dwarris on Statutes*, 278, it is said on the authority of *2 Salk.*, 606, that when a statute gives a penalty to be recovered before Justices of the Peace, but prescribes no method of recovering it, the proper method is by indictment, and if from any omission in this statute as to the procedure or the mode of inflicting punishment, the defect was fatal as to the procedure, an indictment for a misdemeanor would no doubt be sustained. Here the prohibiting clause and that pointing out the manner of proceeding for the penalty are distinct clauses, and in fact the manner of proceeding,—as for a private debt,—depends on another chapter in the statutes altogether distinct. In *Archbold's Criminal Practice*, p. 2, it is said that if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued and no other, and again, "even if a statute prohibits, under a penalty, an act which was before lawful, and a subsequent statute, or the same statute in a subsequent substantive clause, (which is literally this case, if section 23 is intended to apply to this case at all,) ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause as for a misdemeanor at common law, or he may proceed in the manner pointed out by statute, at his option." And in *Rex* v. *Buchanan*, 8 Q. B., N. S., 883, it was held unanimously by the Queen's Bench that an indictment would lie against defendant for acting as an attorney by retaining and instructing counsel in an appeal case before the Quarter Sessions without being duly admitted or enrolled as an attorney in compliance with section 2 of 6th and 7th Vic., cap. 73, although sections 35 and 36 provided as a penalty that no fees should be recovered, and that such offence should be a contempt of court, and be punished accordingly. PATTESON, J., in that case, said that though there was no distinct decision on the point the authorities, as summed up by Mr. Williams in a note to *Rex* v. *Dickenson*, 1 Wms. Saund., 135 *d*, established the principle; and Lord DENMAN, C. J., in delivering

the judgment of the Court, said; "I am of opinion that wherever a person does an act which a statute on public grounds has prohibited generally, he is liable to an indictment. I quite agree that where *in the clause containing the prohibition* a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct absolute prohibition the act is indictable. Here the clauses authorizing the punishment by a proceeding for contempt are quite distinct from the prohibitory clause." * * * He adds; "The decision in *Crofton's Case*, 1 Mod., 34, has, one might almost say, become infamous. There the substantive clause, 17 C. 2, c. 2, s. 3, *simply prohibited the act upon pain of a pecuniary forfeit.* There was not the least ground for holding it indictable." Some of the definitions would indicate that an indictment might be maintained for a sale without license in violation of section 2 of our act, inasmuch as the punishment is prescribed by section 6, but this case of *Rex* v. *Buchanan* shews that it could not. It would be otherwise, however, probably, except for the words at the end of section 2, referring to section 6, and I think *Rex* v. *Buchanan* and the reasoning upon which it turns shew that though the offence under our statute is not indictable, it would have been so if the summary punishment had not been imposed by the very clause which is referred to in and which must be read with that which prohibits the offence. It can hardly be said, however, that liability to indictment is the standard by which we are to ascertain whether a violation of a statute is a "civil matter." An offence amounting to a contempt of court, as in that case, is not a civil matter. See *Tidd's Practice.*

Now let us examine the statute conferring jurisdiction. By chapter 40, of 1876, which is an act to amend the act to Incorporate the Town of Truro, it is enacted thus:—

1. "The Municipal Courts of the Town of Truro * * * * shall be, a Court for the trial of Civil Causes, known as the Town Court, to be presided over by the Recorder or Stipendiary Magistrate, and a Court for the transaction of all Police and Criminal business of the town, known as the Police Court, to be presided over by the Recorder, Mayor or any

Councillor." The jurisdiction of the Town Court is defined by section 5 of that act, which says; "The Town Court shall have jurisdiction, cognizance and power to try and determine in a summary way without a jury, all *civil actions or dealings ex contractu*, in which the whole cause of action shall have arisen within the Town of Truro, and in which *the cause of action does not exceed eighty dollars*, or where there are balances not exceeding eighty dollars upon accounts stated and settled previous to suit, and all such civil contracts, where the amount originally due has been reduced to eighty dollars or less by payment of cash, and when the defendant shall prove an offset of greater amount than the plaintiff has proved, may give judgment in favor of defendant for the balance due him, and shall try in a summary way, *without a jury, actions ex delicto in the nature of replevin, trespass to land* or buildings or other real estate, in which the title or right of possession is not the object of controversy, provided the cause of such action originated within the limits of the town, and the damages claimed in any such case do not exceed sixty dollars." And then follow these words, which is the language relied on to obtain the jurisdiction claimed; "*Such Court shall have and possess all the powers in civil matters within the Municipality conferred upon one or more Justices of the Peace or Stipendiary or Police Magistrate by any Act of the Province of Nova Scotia, or hitherto exercisable or held by them or him; and such Court shall* have power, whenever a defendant in any suit resides within the limits of the town, or is temporarily absent from the municipality, but resides or is within the boundaries of the County of Colchester, to issue its writs and processes of every description against him, and to cause the same to be duly served and executed in any part of such County by the officers of such Court, and by any constable of the County of Colchester, and to adjudicate upon the same."

These statutes are to receive a strict interpretation; the words shall be restrained for the benefit of him against whom the penalty is inflicted, and if there is a reasonable doubt of the meaning the party must be discharged. "The law of England," says *Dwarris*, "does not allow of constructive offences or of arbitrary punishment. No man incurs a penal unless the act which subjects him to it is clearly within

spirit and the letter of the statute imposing such penalty. 'If these rules are violated,' said BEST, C. J., in the case of *Fletcher* v. *Lord Sondes*, 'the fate of accused persons is decided by the arbitrary discretion of Judges and not by the express authority of the laws.'"

If this section 5 of chapter 49, of 1876, defining the jurisdiction of the "Town Court" had, instead of "all the powers in *civil* matters conferred upon justices," given to the court all the powers in penal and criminal matters conferred upon or hitherto exercised by justices, the case would stand differently for the prosecution. If anything can be claimed of section 23 of the License Act it is that by that section the Legislature has conferred power on the justices to deal with a criminal or penal offence *partly* by a *procedure* used in their jurisdiction over civil matters, pointing out the form and mode of making the conviction as it had hitherto been always used in criminal cases. How can it be said that either by the spirit or letter of the act the offence itself is changed and becomes a "civil matter," or, in its essence, a "debt." This is very far from the question of how the remedy is to be pursued. Is the violation of the act subjecting the party to a specified term of imprisonment in failure of payment of a fixed sum as a punishment of the offence a "civil matter" or a "debt"? I think assuredly this is not a "civil matter," and if not a "civil matter" then clearly no jurisdiction is conferred on the Town Court.

But is there not here another insuperable difficulty in the way of the prosecution? It appears to me that the first part of section 5 limits the jurisdiction to certain specified actions *ex contractu* and *ex delicto*; and the latter part of the section already quoted, introduced by the word "such," is limited and controlled by the first part, and this latter part refers rather to procedure than to the subject matter of jurisdiction; and I submit, with deference, that there is authority on this very point. DWARRIS, (page 218,) says; "Though used in their plain and ordinary sense general words may be limited by the relative word *such* to a particular description of thing contained in a preceding section." Here the "particular description of thing" is contained in the same section, which strengthens the case. See *3 T. R.*, 135; *6 B. & C.*, 446;

10 B. & C., 500. At the most it could only be held that section 5 gave jurisdiction by implication, and not only is the construction in favor of the prisoner to be maintained on that ground, but it is a rule of interpretation also that a statute containing a new jurisdiction ought to be strictly construed.

But if this argument for jurisdiction fails, as I think it has failed, jurisdiction, it is contended, is to be supported on a different ground. After the enacting of the statute incorporating the town of Truro, and previous to the passage of chapter 49, of 1876, the town, without any authority to do so, passed the following among other by-laws:—

No. 4.—MUNICIPAL COURT.

"1. There shall be a Municipal Court, to be presided over by the Stipendiary and Police Magistrate, or as hereinafter provided by the Mayor or one Councillor, and the Town Clerk shall act as clerk thereof. * * *

"6. The Municipal Court shall have and exercise within the bounds of the municipality all the powers and jurisdiction in criminal matters conferred upon one or more Justices of the Peace or Stipendiary or Police Magistrate, by any Act of the Province or the Dominion of Canada, or hitherto exercisable or held by him or them. The Municipal Court for the trial of criminals shall sit every day, if occasion require, commencing at ten o'clock, A.M., and shall continue until all the causes are disposed of. Provided, that the Stipendiary Magistrate or person presiding may continue any complaint for such time as may be necessary.

"7. The administration of police within the town, and all the executive powers of the corporation, are vested in the Mayor and Councillors, and the Stipendiary Magistrate. The Mayor and Councillors in rotation, according to a roster, to be by the Council prepared, shall attend at the Police Office at some suitable time and times to be named, and shall perform every act appertaining to the office of Justice of the Peace, Stipendiary or Police Magistrate, necessary for the apprehension, committal, conviction and punishment of criminal offenders, and for carrying into effect the laws in force and the ordinances and by-laws of the town, and shall have and exercise all and every the powers vested in the criminal sid-

f the Municipal Court, provided that the Mayor or Councillor ıall at all times have the power of calling to his assistance ıe Recorder and Stipendiary Magistrate, and that nothing ərein contained shall be deemed to abridge the power of the tipendiary Magistrate as a Police Magistrate, and that by rder of the Council the Stipendiary Magistrate may be placed a the roster, and shall attend in rotation in the same manner s the Mayor and Councillor.

"8. The Municipal Court shall be holden for the trial of ivil causes on the first and third Tuesday of every month, ommencing at ten o'clock, A.M., and may sit by adjournment, om day to day, until all the causes in the list for trial are alled. * * * * * *

No. 7.—PROSECUTIONS.

"1. All *fines and penalties* incurred under the statute oncerning the town of Truro, or any act in amendment f or in addition thereto hereafter to be passed, or under any y-law or ordinance of the town, or *for any breach of any rovision of any act of the Province now or hereafter to be n force respecting the sale of intoxicating liquors, may be nforced in the Civil or Police Court* of the town at the *rosecution of the town*, and all fines and penalties when ecovered shall form a part of the general funds of the town."

This was clearly *ultra vires* the new corporation, and by he 13th sec. of cap. 49, of 1876, it was sought to legalize some f these by-laws. Here is sec. 13:—

"13. The by-laws and ordinances of the Town of Truro, pproved by the Governor in Council on the third day of ugust, in the year of our Lord, one thousand eight hundred nd seventy-five, *except so far as the same are amended by this ct*, are hereby confirmed as the by-laws of such town, and ıay be acted upon and enforced as if the same were enacted nd published with and as part of the Act of Incorporation f such town. The Mayor and Council of such town shall ave power to make other by-laws, and from time to time to lter and repeal any of such by-laws and ordinances, and uch additions, alterations and amendments shall, when pproved of by the Governor in Council, have the force of aw. *Provided that all such by-laws heretofore so passed*

and approved, or which shall be hereafter so passed and approved, *shall not be inconsistent with the provisions of this act, or of the act hereby amended or any other express law within this Province.*"

By virtue of this alleged legalized by-law No. VII, the all fines and penalties for breach of the act respecting the sal of intoxicating liquors may be enforced in the Civil or Polic Court, at the prosecution of the town, to form part of th general fund of the town, it is contended the Town Court Truro obtained jurisdiction over this suit brought by the Cle of License for a penalty under sec. 23, the one-half of whi is to go to the informer and one-half to the County Treasu y.

A more extraordinary contention I never heard. I can ot have a doubt that it should fail entirely, because:—

1st. There never was and is not now a "Civil Court," eo *nomine*, in existence.

2nd. If the "Civil or Police Court" was a term used to represent the "Municipal Court."

a. This is not the "Town Court" and,

b. The "Municipal Court" is not in existence.

3rd. Section 13 if not too indefinite and if it can be said to give any force or effect, whatever, to the illegal by-laws, only confirms those which were not inconsistent wit law.

4th. The suit in question was never contemplated by "by-law" No. VII, inasmuch as it is not at the prosecution of the town for the benefit of the town.

Besides, to permit the court below to grasp or exercise jurisdiction in this indirect manner through these extraordinary "by-laws," where the lines which separate those parts which are claimed to be in force from those which by no mode of reasoning can be held to operate, are vague in the extreme, it seemed to me might lead to the greatest confusion, and I cannot refrain from saying that I am unable to understand the construction by which such jurisdiction is to be supported.

It appears by the prisoner's affidavit that he was, at th time of his second conviction, imprisoned under the fir conviction now attacked, and was therefore unable to present. Without going into the question as to the pov

f the court to convict under sec. 6 of cap. 75, *R. S.*, in the bsence of the prisoner, but assuming that the proceedings re to be supported under sec. 23 in the same manner s a debt, even under that provision the justices had no urisdiction to proceed, as appears by sec. 8, cap. 91, *R. S.*, here the defendant did not personally appear, except on ffidavit of the constable of personal service of the summons, nd because this did not appear when the return of the jailor vas before us on an application precisely similar to this, *In re Donald McEachern*, (ante p. 321) on the 19th of January last he Court discharged the prisoner. Whether this should appear n the conviction may be a question. In *Arch. Crim. Prac.*, Waterman's ed., *Rex* v. *Vipont*, 2 Burr, 1163, *Rex* v. *Killett*, Burr, 2063, and other authorities are cited in support of a note hat where a special power is given to a magistrate by statute o convict an offender in a summary manner without a trial by ury it must appear that he has strictly pursued the power; hat the record should show upon its face everything necessary o constitute a legal conviction,—the offence, and what statute r section of a statute was violated; that legal notice was given; whether the defendant was present or absent, and if present, that the complaint was read to him, and his answer o it. It should set out not only the names of the witnesses ut the substance of the testimony, that the Court may judge f the sufficiency to convict.

If the presence or absence of the prisoner should have ppeared on the conviction the defect applies to both convic- ions; if otherwise, the latter only, on this ground, is bad.

Neither in the conviction nor the execution is any offence tated in the first proceeding, and therefore I need add nothing n relation to that subject.

FORSYTH *v.* FORSYTH.

A DEED of land was made by a father to one of his sons, who, at the father's request, gave his promissory notes to his father payable to the other brothers respectively, the arrangement being made for the purpose of distributing the estate of the father without a will. The notes were lodged by the father with another person,

Held, that the payees could not recover on the notes for want of consideration moving from them to the maker.

THIS was an action on a promissory note tried in the County Court, in which judgment was given for the plaintiff.

Henry, for appellant.—The facts are that the father gave a deed to one of seven children, and took six notes of £50 each in favor of the six remaining children respectively. The notes were handed over to the children after the father's death, and on one of them this action was brought. The action is defended on several grounds, chiefly for want of consideration proceeding from the plaintiff to the defendant. For the sake of argument I will take the evidence of the plaintiff himself. In the first place there is not a particle of evidence which has been properly received to shew what this note was for. We have denied the consideration, which puts the plaintiff to the proof. The principal evidence as to the terms of the arrangement was given by the plaintiff himself, no objection being made on the part of defendant. It clearly appears from this evidence that the position of the matter is this. This note was handed by Richard Forsyth to his father, who gave Richard a deed of the land of which he (the father) was then in possession, worth $1000 or $1200. At the same time Richard delivered the other notes to his father, these notes forming, altogether, the consideration for the land. The notes were held by the father until shortly before his death, when they were handed by him to William Forsyth, who, after the father's death, delivered them to the plaintiff and the other children of deceased, in whose favor they were drawn. The note in suit was given to the plaintiff under such circumstances as would enable the Court to infer that Richard intended to be bound by it. I admit all this for the sake of argument. The question now is, under all these circumstances, what legal consideration is there to support an action on the note given to plaintiff. I think there is none. The defendant,

of course, got a benefit which would make him liable to the father, but there is no consideration whatever moving from the plaintiff. There was none when the note was made, and there was none afterwards, even admitting that a want of consideration when the note was given could be subsequently supplied. (YOUNG, C. J.—You must shew us strong cases for such a position. Do you contend that if a man borrows $500 from A., he cannot have the notes drawn in favor of his son?) If the notes were so drawn they would be perfectly unavailable. There are three things required. First, mutuality of obligation, second, a legal consideration, thirdly, consent. The consideration is not motive, it is not cause; it means motive and cause combined operating between the parties. All the money I could give A. could not make him liable to pay B. at the suit of B. (JAMES, J.—Would not an action lie at the suit of B. for money had and received?) I think not. (MCDONALD, J.—Is not this stronger than a mere case of gift?) I think not. We have nothing to deal with save the law affecting consideration in contracts. With regard to consideration, it must move from one party to the other, from the plaintiff to the defendant. (YOUNG, C. J.—It is a very startling proposition.) I believe I am right in thinking that the consideration here is not of a kind to support the action. (YOUNG, C. J.—Suppose a man leaving the country sells a ship, and instead of taking a note to himself, instructs it to be made to a bank to which he owes the amount.) The cases are entirely different. The one your Lordship puts is a well-recognized exception. In that case the man who sells the vessel owes the bank, and the man who buys her is indebted to him. The bank says to the purchaser; "If you pay us we will release the seller, and you from your obligation to him." There there is a distinct consideration which is entirely wanting here. That transaction is called a *novation*. (WEATHERBE, J.—I do not think the present action can be supported on the principle of *novation*. The father endeavored, here, to make a will in this way, and the question is whether he could do it or rather whether he has done it.) Cites *Price* v. *Easton*, 4 B. & A., 443.

The next question is whether the consideration, having been wanting at the time, could be subsequently supplied.

At one time the law was in accordance with the equitable principles laid down by your Lordships, and it was held that where a father took a note payable to a son, the son could recover, though it was admitted that there was a right of action in the father. But it was found that the principle was not sound. In *2 Levintz*, 210, there is a case of the character to which I have just referred. (WEATHERBE, J.—The case appears to be exactly the same as this. When was it overruled?) I will give your Lordships ample authority on that point. In that case a man, being in possession of land, was about cutting down timber for the purpose of raising a portion for his daughter. The son, who was his heir, said he would pay his sister £1000 if his father forbore to cut the wood. (MCDONALD, J.—I think that case is distinguishable from this. Here there was a deed actually given. In that case there was none.) There was that given which in reference to the question of consideration is as good as all the land in the world. The son got the forbearance of the father to cut the wood. There was the forbearance of an act which the father might legally have performed. It makes no difference whether the son had an interest in the land or not. If an entire stranger had made the proposition to the father, it would have been the same. Cites *Lampley* v. *Brathwaite*, 1 Smith's Leading Cases, 282; *Tweedale* v. *Atkinson*, 1 B. & S., 293, *per* WIGHTMAN, J., overruling the case in *Levintz*.

Eaton, contra, cites *Cook* v. *Long*, 1 C. & M., 510. Family affection is a good consideration.

MCDONALD, J.—The consideration here was not family affection. It was the deed given.

WEATHERBE, J., now, (February 16th, 1880,) delivered the judgment of the Court:—

In this case the note was made by one son, in the life time of the father, and at the father's request, in favor of the maker's brother, and lodged by the father with another person. It was made payable three years after the death of the parents, and the agreement was that it should be delivered to the payee upon the death of the father. This was done, it is said, for the purpose of distributing the estate of the father without a will, and in lieu of legacies.

There is no evidence of any consideration moving from the payee, and however we may regret that any arrangement of this kind should be broken up, we think the case of *Tweddle v. Atkinson*, 1 B. & S., 398, settles the question, and notwithstanding the decisions in the United States as to whether a man can sue on a contract made for his benefit, but to which he is not directly a party, we know of no authority and none was cited in support of such a right in England. The appeal must be sustained with costs.

McLEAN *v.* McKAY.

Capias issued by Magistrates set aside on the ground that it was issued and the defendant arrested under it without an affidavit of the grounds of plaintiff's belief, as required by chapter 22 of 1879, section 3.

In this cause a capias was issued by Magistrates, after the statute passed in 1879, chapter 22, without an affidavit setting forth the grounds of the plaintiff's belief that the defendant was about to leave the country, as required by section 3. The Magistrates treated the capias as a summons and tried the case giving judgment for the plaintiff from which an appeal was taken to the County Court. A rule was taken out in the County Court to quash the proceedings, but was discharged, and an appeal was taken to this Court, which was argued before DesBarres, McDonald, Smith and James, JJ.

Gourley, for appellant.—My case is that the affidavit was not made, and that the whole proceedings are therefore void.

King, contra.—I admit that the Magistrate was wrong in causing the party to be arrested without the required affidavit, and that he might be liable for damages, but is that enough to set aside the whole proceedings? He may ask to be relieved from arrest. The statute says that in all cases where the party *arrested* the affidavit is required. The process issued out of the Magistrates' Court combines the summons and capias in one, as was formerly the case in the Supreme Court. The capias is as much a summons as the summons itself. The act does not say that the summons cannot be *issued* without an

affidavit, but merely that the party shall not be *arrested*. (WEATHERBE, J.—Has it ever been held that the capias can be set aside and not the other proceedings, previous to the change in the practice?) I think so. Cites *Murphy* v. *Trenholm et al.*, Thomson's Reps., 228. It operates precisely as if the Magistrate had made a mistake. (WEATHERBE, J.—Why was the arrest not set aside.) The men were not under arrest. (WEATHERBE, J.—Why did not the County Court Judge set aside the arrest? There was an arrest sworn to.) He was not asked to. (WEATHERBE, J.—The Judge, according to your own argument, should have set aside all the proceedings but the summons, so that the man might have his action. If he brought an action the Magistrate might plead that the proceedings were all good, not having been set aside. The County Court Judge has refused to set anything at all aside. DESBARRES, J.—The man was arrested and gave a bail bond, informal though it be, and which he believed to be good, on which he was discharged.) The rule asked too much when it sought to set aside all the proceedings. It cannot be made absolute if it asks too much. (SMITH, J.—It may be moulded. It is only a question of costs. WEATHERBE, J.—I think a rule where it asks too much may be moulded according to the circumstances.) The party having appeared before the Magistrate with notice that he was to answer to the plaintiff, and there being particulars annexed shewing what it was about, and the amount being within the jurisdiction of the Magistrate, he could proceed. The party was not in custody at the time. He attended voluntarily. (DESBARRES, J.—Having been arrested and given the bond, he considered that he was bound to appear. The bond was not essential; it was only taken for the security of the constable, and the man having appeared we must assume that the constable brought him.) As to waiver see *L. R.*, *4 Q. B.*, 674. (McDONALD, J.—If the man went for the purpose of defending it might be a waiver, but he went for the purpose of testing the legality of the proceedings, and employed counsel for that purpose. The case cited is not at all like this.) He might object to the arrest, but if he was there he could not object to the Magistrate proceeding. (DESBARRES, J.—You say that even if a party is brought before a Magistrate illegally he cannot object to the jurisdiction.) I don't know but that I might go that far.

DESBARRES, J.—I have no doubt you have made the best argument you could, but, unfortunately, we do not agree with you. We think, taking the whole proceedings together, that they were illegal and vicious. There was no voluntary appearance before the Magistrate, and he was not justified in acting as he did.

WEATHERBE, J.—I think the appeal must be sustained and judgment given for defendant. The County Court Judge should have made the rule absolute.

SMITH, J.—I have no doubt about it.

MCDONALD, J.—I should be sorry if the law were as Mr. King has contended.

ROUE *v.* PRENDERGAST.

THE defendant having been arrested on an execution, obtained the privilege of jail limits, as fixed by an order of Court under Revised Statutes, chapter 22, section 7, and gave a bond with a surety to the Sheriff, who assigned it to the plaintiff.

Held, that the bond could not be transferred by indorsement as a bail-bond so as to vest a right of action in the transferee, and that fourteen days' notice of action must be given by the assignee.

Q. As to the legality of the bond.

THIS was an action on a bond conditioned that the defendant, who had been arrested under an execution, would not go outside the jail limits. The bond was made by said defendant and F. A. Laurence, Barrister-at-law, to the Sheriff of Colchester, and assigned to the plaintiff. The defendants relied on pleas, denying the making of the bond, denying the assignment and notice, and setting up the ground that Laurence, being an attorney, could not make such a bond. The judgment of the County Court was for the defendants, and was appealed from.

Eaton, for appellant.—The question of illegality of the bond cannot arise, not having been pleaded; section 136, chapter 94, Revised Statutes, (Practice Act.) This is the same as the English Act. *Patts* v. *Sparrow*, 1 Bing. N. C., 594; *Martin* v. *Smith*, 4 Bing. N. C., 436; *Fenwick* v. *Laycock* 1 G. & D., 27; *Ransford* v. *Copeland*, 6 A. & E., 132. As to the contract, I fail to see where it is illegal. The Revised Statutes,

chapter 22, section 7, "Of Jails and other County buildings," give authority to fix jail limits. (WEATHERBE, J.—Where do you get authority for the bond? Does the statute authorize it?) No. (WEATHERBE, J.—May the prisoner go outside the walls of the jail?) Not without the order under the statute. (WEATHERBE, J.—You might include the whole town in the jail yard or limits.) In Ontario they include the whole county. (WEATHERBE, J.—The word must have a reasonable signification. The Court must keep within the meaning of the Act.) The order of the Court fixes the limits. (WEATHERBE, J.—But is it not *ultra vires?*) After the order of the Court had fixed the limits it would be hard to hold a Sheriff liable for an escape for permitting a prisoner to use them. (WEATHERBE, J.—The Legislature only gives the Court power to extend the jail yard and not the limits. It is clear that they refer distinctly to two different things when they speak of the jail yard and the jail limits.) The bond provided that Prendergast should not go off the jail limits. If he did not go beyond the limits there would be no escape. The Sheriff may keep the prisoner within the four walls of the jail, but if he permits him to go outside, I see nothing illegal in his taking a bond that the prisoner will not go beyond the limits. If this is a bail bond it can be assigned by endorsement under the statute. Chapter 94, section 355, and the two following sections are all that refer to this matter. This is a bond for the payment of money. No notice of action was necessary. Section 352 refers to notice. We have given sufficient notice. A similar bond is called a bail bond to the limits; 4 Anne, chapter 16, section 20, referred to in *Dicey on Parties*, 117. It is not competent for Mr. Laurence, after signing this bond and getting the advantage of it and asking forbearance, to take advantage of an old English rule to release himself. If bail is given by an attorney and not excepted to, it is good. *Douglass' Reps.*, 467. Laurence has so sanctioned the assignment of the bond as to preclude him from calling it in question. A new consideration has arisen in the forbearance which he asked and which he received.

MCDONALD, J.—My only difficulty is whether this can be called a bail bond or not. I think notice should have been given.

DESBARRES, J.—I have the same difficulty.

WEATHERBE, J.—I have no difficulty.

SMITH, J.—I have no doubt this is not a bail bond. It is a bond not recognized by the statute at all.

The Attorney-General, for defendant, was called upon on this point. The mere head-note of the reporter in which it is called a bail bond does not make it such. Nor has it any of the qualities of a bail bond. In the case of a bail bond the party is taken out of the hands of the Sheriff and placed in the hands of his bail, and may go to Europe if he pleases. Mr. Laurence had no custody of this man. It was a mere bond of indemnification. If it was only a bond for the retention of the party within certain limits it was not bail. In the Canadian case the bond was very like what we call a bail bond, and might reasonably be called such. It seems to me I have covered the ground when I say this is a bond of indemnity and not a bail bond, and that, as the party still remained in the custody of the Sheriff, Mr. Laurence had no control of him. Section 197 of the Practice Act, in reference to assignment, refers only to a bond in the form, schedule A. No. 26. The statute of Anne only refers to process issuing out of the Courts at Westminster.

WEATHERBE, J.—Admit that it is a bail bond and that the statute of Anne applies. The statute requires two witnesses, who must sign or be proved to be present.

Eaton.—I don't think I require to prove that it was executed in the presence of two witnesses. But there were two assignments, each executed in the presence of one witness, which makes two. The same solemnity is not required as in the case of a will.

THE COURT.—The appeal must be dismissed.

HOSSOCK ET AL. *v.* NEILLY.

WHERE an action of replevin was brought for goods sold by plaintiffs to defendant, and there was evidence to justify the Judge who tried the cause without a jury in coming to the conclusion that the defendant had made false representations to the plaintiffs as to his solvency, knowing them to be false, the Court refused to disturb the judgment for plaintiffs.

THIS was an action of replevin brought to recover goods alleged to have been sold to defendant on the faith of false statements regarding his solvency. There was a verdict for plaintiffs, and a rule *nisi* taken out to set it aside as against law and evidence, and against the weight of evidence.

McCoy, Q. C.—Harris says he asked defendant in relation to his solvency at the Halifax Hotel on the 13th of February, two days before the sale. He says further that on the 14th or 15th he went to defendant's place of business, and that defendant then made representations concerning his financial position. This second conversation the defendant wholly denies. At the sale, according to the defendant, there was no such conversation. That is the difference between them. The plaintiff should have made enquiries at the time of the purchase of the goods, to make it part of the contract. Is there sufficient evidence here to convict the defendant of fraud? (SMITH, J.—Can you convict a person of fraud on the evidence of one witness who is contradicted by another equally reliable?) What evidence is there here of intent to defraud? The defendant admits the statements made at the Halifax Hotel, but in the course of a day or two he was advised of losses amounting to $29,000, not to speak of Mackintosh's failure, which embarrassed him further. The defendant accepted a draft from plaintiffs before his goods were delivered. There is no evidence that it was returned. The Judge who tried the cause expresses his belief in the defendant's evidence, and that he was led away by a sanguine view of his affairs. Where, then, is the fraud? (RITCHIE, E. J.—With all these losses and Mackintosh's failure coming at once, a man might be solvent, as business people are, one day and not the next. SMITH, J.—I would be sorry to sentence a person to imprisonment on evidence like that.) The plaintiffs do not prove a single loss or false representation at the time. *14 M. & W.*, 651, deals with the

whole law on the subject. See also *8 Exch.*, 730. Mackintosh says if these losses had not occurred he would have considered the defendant a fair business risk. *Chitty on Pleadings*, vol. 2, p. 519, reviews all the law. The question is was there intent to deceive, or was the representation honestly made. The defendant could have had no means of knowledge. There must be a reckless statement shown. (RITCHIE, E. J.—The defendant himself did not claim to be more than in fair circumstances.) The other party was put upon enquiry; *5 Q. B.*, 820. *Parsons on Contracts*, vol. 2, p. 271, shews that in many cases it is exceedingly difficult to draw the line. See also *Fisher's Dig.* for 1876, *Panama Tel. Co.* v. *India Rubber Tel. Co.*

Foster, Q. C., contra.—I admit all the law cited. The question is one on the evidence whether the defendant made statements knowingly or recklessly false. If the evidence does not show this we cannot hope to succeed. The Judge who tried the cause does not find in favor of the defendant, although from his appearance and manner he was disposed to do so. (RITCHIE, E. J.—He thought it was a nice question, but that, on the whole, the plaintiff should recover. YOUNG, C. J.—The only question is whether defendant did an intentional wrong.) This is merely an action to recover property. (SMITH, J.—But after the change of property you must shew fraud to do that.) It is a difficult thing to prove a statement of a business man's position at a particular time. The defendant had an opportunity to bring his books in and clear his skirts entirely. (RITCHIE, E. J.—The onus was on you.) Defendant told Harris his business was pretty fair; he was making money. The money was $2,500, his commission on a cargo shipped. He says Mackintosh held security to the extent of $5000, and had been going on in this way for two years. His first shipment was the "*Bella Mudge*" in December, and in January Mackintosh protected a draft here. Neilly says he knew this was dishonored, and that it might have been previous to the delivery of the goods. There was a concealment of facts as to speculations that he had gone into and of the fact that he could not be solvent unless they turned out favorably. As far as he knew the result was unfavorable, there being a large loss on the "*Bella Mudge*," though he did not know the amount.

of it. (RITCHIE, E. J.—If everything was embarked in the speculations your argument is very strong.) There was a representation of the speculations, concealing the fact that everything was embarked in them. (RITCHIE, E. J.—He may have been bound to tell of the loss, but not of the speculations.) He had to borrow money to buy the cargo, and his solvency depended solely on the result of a hair-brained speculation. (RITCHIE, E. J.—I don't think you have any right to pass such an opinion. It is becoming a very common business to ship produce to the London market, and I am glad to see it. The transaction was the more legitimate because there were several cargoes, and if one turned out badly the others might do well. The fraud must be very apparent to enable you to go into a man's place of business and take away goods you have sold to him. It is strange that he was not examined more closely upon his gains and losses.) He was fully examined on that point, and everything got out of him that could be.

RITCHIE, E. J., now, (February 16th, 1880,) delivered the judgment of the Court:—

This was the case of replevin brought to recover the possession of goods sold by the plaintiffs to the defendant, as they allege, on a false representation as to his solvency. The learned Judge before whom it was tried without a jury gave judgment for the plaintiffs.

Whatever representations were made by the defendant, and however false and fraudulent, the goods having been delivered and a draft for the price accepted, the sale cannot be deemed void, at most it would be only voidable. The property passed to the defendant, but the plaintiffs, as soon as they discovered the fraud, could elect to treat the contract as binding or could disaffirm it and resume the possession of the property; they could not do this while they retained the acceptance for the price. The acceptance was produced at the trial, and there is no evidence when it was returned, but it was produced on the part of the defence, and if returned to him *after* the taking out of the writ of replevin he should have shown it.

To enable the plaintiffs to avoid the contract the representation made to them by the defendant must not only have

been false, but must be shown to have been known by him to have been false, and made with a fradulent purpose, and while I cannot but feel some doubts whether this has been very clearly established, I cannot say that there is no evidence to lead to that conclusion, and, as the learned Judge who tried the cause has arrived at that conclusion, and he has had a better opportunity of forming a correct opinion on the subject from having had the witnesses before him, and heard their *viva voce* examination, I think his judgment should not be disturbed. The rule *nisi* will, therefore, be discharged.

SMITH, J.—I have some difficulty in coming to the same conclusion, and, if I had tried the cause I would have probably decided differently. Still there were peculiar circumstances in the case upon which it would have been peculiarly within the Province of the jury to decide, and, on this ground, I think the verdict cannot be disturbed.

SIR WILLIAM YOUNG, C. J.—I think the verdict in this case for the plaintiffs should be sustained. There is danger, no doubt, where the sum is small and the goods delivered and on the defendant's shelves, in upholding a replevin by the seller, but the circumstances in proof and especially in the evidence of Mr. Mackintosh seem to me to justify it. The plaintiffs' agent and the defendant come together on the 13th February; on the 16th or 17th the plaintiff having declined to fill the order, the agent is reassured by the defendant telling him that he had cleared several thousand dollars in his last consignment to Europe, and that he was solvent and making money, whereupon the goods were sent on or about the 27th February. Now Mr. Mackintosh says, and whatever he knew we must infer that the defendant knew; "From the middle of February to the first of March I felt there would be an enormously heavy loss on the cargo of the "*Bella Mudge*." About the 1st to the 8th of February, I learned from the defendant that the Bank of B. N. America had sold some of the potatoes at very low rates, and some were damaged. I knew from the 20th of February that the enterprise would be disastrous."

On the 24th January defendant got an advance of £1000 on the cargo which Almon & Mackintosh granted and no doubt

lost, defendant having no means of meeting it. Under these circumstances his assurances to the plaintiffs' agent were misleading, and he ought not to have ordered or received the goods.

The bill of exchange accepted nine days before the arrival of the goods on the 8th of March was of no value and was given up at the trial, and I cannot think that its having been held by the plaintiffs at the time of action brought is an answer to it. Had it been discounted and proved to have been here when the plaintiff issued the writ, the case would have been different.

McKENNA *v.* TRACY.

Rule *nisi* under the statute for a new trial discharged on the ground that a bond was filed instead of a bail-piece.

In this case a rule *nisi* was taken out under the statute to set aside a verdict in a cause tried before Weatherbe, J. The attorney on taking out the rule filed a bond instead of a bail-piece, and on this ground,

Rigby, Q. C., moved, (Feb. 27th, 1880,) for the discharge of the rule *nisi*.

Meagher, contra, contended that the bond, in view of the the terms of the rule was sufficient. (Weatherbe, J.—I never granted any such rule, and not only that but I cautioned the attorney, when he moved for the rule at Sydney, to be careful and see that he complied with the statute in taking his rule.)

Sir William Young, C. J.—We decided this question in [illegible] *Church*, a King's County case, some years ago, On that case we discharge the rule.

RUMSEY *v.* PROVIDENCE WASHINGTON INS. CO.

PLAINTIFF brought action on a policy of insurance on goods supplied for a trading voyage. The vessel was wrecked on the Labrador coast at a place where there was no boat, no wharf, and no means of saving the goods, with the exception of one vessel, which had a cargo of her own, and could not be compelled to remain to protect the property. To leave the goods in the vessel all winter would have been extremely hazardous, and the master sold them without notice,

Held, that, considering all the circumstances, the sale was justifiable, and therefore notice of abandonment was not necessary.

Plaintiff was permitted at the trial to amend his declaration by alleging the interest in the insurance to be in one M. along with the others originally named.

Held, that the Judge had the right to allow the amendment in his discretion.

THE schooner "Mable Clare" while on a trading voyage to Newfoundland put in at St. Augustine on the Labrador coast, partly on account of the threatening appearance of the weather, and partly for the purpose of obtaining supplies of wood and water. While leaving port, a day or two subsequently, between 7 and 8 o'clock, A.M., with all the lower sails set, and running under a fair breeze, she struck a sunken reef and remained fast, all efforts to get her off proving useless. The only persons living at St. Augustine were a few fishermen. There was no post office or telegraph office, or other means of procuring assistance. The season was late, and only one other vessel, the "Polar Star," was present. An informal survey was held by the steward of the "Polar Star" and a resident of the place, in the absence of merchants or shipping masters, and there being no means or prospect of saving anything, and no wharves or stores there, vessel and cargo were sold to the captain of the "Polar Star" for about $1200.

The action was brought on a policy of insurance effected by the plaintiffs, who had supplied goods to a large amount for the purposes of the voyage. At the trial an amendment was permitted to be made alleging an interest in the insurance in another party in addition to those named in the writ.

Henry.—The first question is as to an amendment permitted at the trial by allowing the interest in the insurance to be alleged to be in Moran along with the others mentioned. If the amendment had not been allowed there would have been a variance. At common law all the persons interested in recovering must be joined, and a party can only recover to the extent of his interest. To allow a plaintiff to add an

interest in another party is in reality introducing a new plaintiff. See *R. S.*, chap. 94, sec. 137, p. 466. Previous to this the law was that if the parties interested were not joined they could not recover. The plaintiff in insurance cannot recover to a greater extent than his loss would have been had there been no insurance. The contract is purely one of indemnity.

In this case there should have been notice of abandonment, if it is a case of constructive loss. It is a case where the goods are left in specie, and the highest degree of care must be shown. The plaintiff must show the necessity for selling.

Rigby, Q. C., contra.—The law was that a stranger might take out a policy for whom it might concern in his own name without averring interest in any one, and might bring an action in his own name, giving the names of the parties interested in the declaration. Our statute was passed to avoid some inconveniences. See *Arnould*, 1014. The question is whether Rumsey & Johnston can recover, and not who is to receive the money provided they can. They put $10,000 worth of goods on board the vessel for trading purposes. The goods obtained in exchange were to be brought back to them, and they were to sell them to reimburse themselves, and hand any surplus over to the parties interested with them. There were three policies on cargo, but altogether they only amounted to $6500. Other insurances were put on for the return voyage.

As to notice of abandonment *Gallagher* v. *Taylor* (ante p. 279,) decides that it is not necessary. A case in *L. R., 3 C. P.*, 467, decides differently, but under the circumstances in this case notice would have been useless, as there was a justifiable sale. It was late in the season. The only warehouse in the neighborhood was full. If Captain Smith's vessel had not been there nothing could have been saved, and the crew could not have got home.

Henry in reply.—I have been unable to find any case where an amendment has been allowed involving such a substantial alteration as this. (DESBARRES, J.—The doctrine of amendment in the interests of justice has been carried a great length. Why should you leave out the name of a party who has an interest, and drive him to bring a separate suit?

The party had an interest at the time and he should have been made a plaintiff. (WEATHERBE, J.—The point as to notice was not reserved.) I think there is a great deal in the point whether a party interested in the result of the suit must not be joined as plaintiff.

The burden of proof is on the plaintiffs to show that the circumstances justified abandonment. *Hunt* v. *Royal Ins. Co.*, 5 M. & S., 47, shows that delay alone is not enough. The burden is on the other side to show that the goods could not be forwarded in the spring. *2 Arnould*, 913.

DESBARRES, J.—We have all considered this case and are of opinion that the verdict ought to be sustained. As to the first point taken, that the Judge had no power to make the amendment, we are all of opinion, after looking at the act, which is the only thing we have to guide us, no cases having been cited, that the Judge had the right to exercise the discretion he did in introducing the name of the party omitted. It made not the slightest difference in the suit either as regards the prosecution or the defence.

With respect to the second point, as to the want of exertions made in saving the cargo, it is perfectly true that to constitute a constructive total loss there must be a notice of abandonment if it is possible to give it and if it will avail anything when given. The object of the notice is to enable the insurers to take possession and save the cargo for themselves; but how could the cargo be saved at this outlandish place, at a time of year when all the people, with the exception of three or four, had retired into the woods, and where there was no boat, no wharf, or anything to assist in landing and preserving the cargo. True there was one vessel, but she had a cargo of her own. Some assistance was rendered by her, but there was no way of compelling her to remain to protect the property. What could the master of a vessel under such circumstances have done? To leave the cargo in the vessel all winter would have been exceedingly hazardous, and would certainly not have been for the benefit of the owners or insurers. We admit that the master must do all he can to save the cargo, but what could he have done here more than he did do? We think, therefore, taking all the circumstances

into consideration,—the locality, the situation of the vessel, the absence of means to save the cargo, and of any place to store it,—that the master was at liberty to sell without notice, and that the verdict must be sustained.

McDONALD, J.—It seems to me that it was better for the underwriters that the master adopted the course he did.

JAMES, J.—Notice of abandonment would have been of no value to the underwriters. They would have been obliged to charter a vessel at Halifax expressly, with the probability that when she arrived there would be nothing left.

WEATHERBE, J., delivered the following written opinion:—

Upon the argument made before us upon the grounds reserved by the learned Judge who tried the cause, I have no doubt this verdict cannot be disturbed. The power of amendment, I think, was vested in the Judge at the trial, and the other point insisted on was not reserved, and from what appears, even if it had been reserved, the sale appears to have been justifiable under the peculiar circumstances of the case, and that being so there was nothing whatever to abandon.

ALMON & MACKINTOSH, *v.* COLE HARBOR LAND CO.

AN application was made by Wallace to rescind an order made for the payment to the plaintiffs of the surplus proceeds of a sale of defendants' land on the ground that the judgment under which plaintiffs claimed the proceeds, and which was taken by default, was based on notes given without any consideration. Wallace had taken proceedings against the defendants, under Revised Statutes, chapter 97, section 26, as a foreign company doing business in this Province by an agent, but the agent had not been served.

Held, that for want of service on the agent Wallace was not in a position to make the application.

Eaton explained this cause as follows:—

Almon & Mackintosh sued the defendants, a company incorporated in London and doing business here. There were three suits brought at different times. Judgments were obtained against the company, and after the first two had been recorded a year the company's property was sold, realizing $5000 over and above what was sufficient to pay the

first judgments. Almon & Mackintosh did not issue an execution on the third judgment, but applied to Mr. Justice WEATHERBE and obtained an order for the surplus proceeds.

The circumstances connected with the third judgment, on which the order was obtained were that the company, having bought the Robertson farm for $2500, left a balance unpaid. For this amount Almon & Mackintosh drew on the company in London, but before the bills were paid the company failed. Almon & Mackintosh, without having ever paid anything on the bills, commenced an action and obtained the judgment by default on which they procured the order. They never advanced anything on the bills on which they obtained judgment. My application is on behalf of Wallace, a subsequent attacher, to have the money so obtained repaid into court or applied to its original purpose. (WEATHERBE, J.—Is it not necessary that you should get the judgment out of the way? If the judgment existed was not the order good?) I think we should have had notice. (WEATHERBE, J.—An order may be rescinded as improvidently granted. You are in the same position as if you were showing cause against an order.)

Weeks, Q. C., (with *Eaton*).—The process never reached the defendants. It was served on Mr. Wallace, who, considering that the suit was brought on some other notes than these for which no consideration was given, made no defence. (WEATHERBE, J.—We will assume that the judgment is utterly bad. The question is whether Mr. Wallace has satisfactorily accounted for his non-appearance. You must show yourself within the statute. Except for the statute you could not come here at all. The only question is whether the subsequent attacher can come in and attack the attachment after the judgment.) Section 10 fixes it. It says the rights of the subsequent attacher are not to be affected by any judgment. This leaves the question whether our rule is broad enough to give the relief we ask. Wallace says Almon & Mackintosh were applied to to obtain funds for the payment for the farm. They drew on the company who accepted. It is not pretended that any debt arose. Without advancing anything and having no right of action they sued and obtained judgment. Their attachment must necessarily go because there was no

right of action on which to found it. The draft was drawn by Watson, the agent of the company here.

The question is whether under the rule the attachment can be set aside. I think this is clear, because Mr. Wallace has sworn that he was a subsequent attacher. The question whether the attachment can be attacked after judgment is met by section 10 of the act. (SMITH, J.—The meaning would be clearer if the words "shall have been" instead of the word "shall" had been applied to the judgments.)

Ritchie, Q. C., contra.—The application must be dismissed because the rule does not set out all the papers on which the rule *nisi* was based. There was a decision to this effect by Judge MCCULLY in *Foster* v. *Chambers*, 1 R. & C., 254, citing L. R., 10 C. P., 474. All the papers on which the rule was granted are not here.

No one but the defendant can attack a judgment, except by statute, as was decided in the previous cases. It was not necessary for plaintiff to issue attachment; he sued under section 26 of the *Absconding Debtors' Act*. Attachment was afterwards taken under section 30. We had a service on the agent. The papers showing the difference between our position and that of the other party here, Mr. Wallace, are wanting. They could not get on under section 30, because their summons has not been served.

Under section 7 Mr. Wallace can only dispute the validity and effect of the attachment, and there is no authority to set aside the judgment. If his rule had been merely to set aside our attachment we should not have opposed it, as it would take nothing from us, the money having been paid us under our judgment. His rule is first, to rescind Mr. Justice WEATHERBE'S order, which could only be done, if at all, at the instance of the defendants; and, secondly, to dispute the plaintiff's claim, for which the statute makes no provision. Cites *Robertson* v. *Cameron*, 2 R. & C., 261, where the party seeking to set aside the attachment was turned out of Court by the application of the terms of section 7; also *Creighton* v. *Daniel*, James's R., 349. (WEATHERBE, J., questions whether the judgment in *Foster* v. *Chambers*, based upon recent English practice, in the face of the Practice Act, chapter 94, *R. S.*, is binding upon the Court.)

Weeks, Q. C., in reply.—The decision in *Foster* v. *Chambers* only goes to this length, that all *relevant* papers must be recited in the rule. All the *relevant* papers are recited in our rule, and are here. It is admitted on all sides that Almon & Mackintosh obtained a judgment in August, 1878, that Wallace obtained a writ of attachment in April, 1879, and that A. & M. obtained their rule for surplus proceeds in May, 1879.

The case of *Robertson* v. *Cameron* is quite distinct from this case; there the party seeking to set aside Robertson's attachment was not a subsequent attacher.

There is nothing in the contention that we are not subsequent attachers; our attachment is here on file, with the sheriff's return indorsed upon it. (McDONALD, J.—But your proceedings are not against an absent or absconding debtor, but against a company incorporated abroad, doing business within the Province.) But we may consider our attachment as issued under section 30, which is independent of section 26. The words "or by either process" in section 30 must be given a meaning.

McDONALD, J., now, (March 5th, 1880,) delivered the judgment of the Court:—

Chapter 97 of the *Revised Statutes* makes provision in cases of absent or absconding debtors, section 2 requiring that the affidavit, which must be made before the issuing of the summons, shall state that the defendant is absent or absconding from the Province, and section 24 providing that the plaintiff shall not proceed in the trial against any absent or absconding debtor unless his real estate or goods shall have been attached, or until the agent or trustee shall have admitted that he has goods of the absent debtor in his possession or under his control. A copy of the summons is to be left at the defendant's last place of abode, as provided by section 2 as service. Strict compliance with the requirements of the statute is necessary to give the Court jurisdiction.

Section 26 and subsequent sections of that chapter apply to a different class of debtors, namely foreign companies or corporations doing business *by an agent* within the Province, and it is provided that service of process to appear on the

agent shall give the Court jurisdiction in the case, but there is no provision in these cases that the attaching of the defendant's property shall give jurisdiction as is provided by section 24 in the case of an absent or absconding debtor. The writ of attachment here is not process to appear at all. Section 28 holds the agent liable to pay the claim out of the assets of the company or corporation if judgment be against them, and section 30 provides that if the plaintiff desire security previous to judgment he may make oath to the cause of action and proceed by attachment against the estate of the defendant, which estate shall then be available to respond the judgment. It is not necessary that the affidavit or the writ of attachment should allege that the defendants are absent or absconding, and the law provides the manner of service of the writ of summons. The proceedings at the suit of Mr. Wallace were clearly taken against the defendants as a foreign company doing business in this Province by an agent, under section 26 and subsequent sections. If the company had not been doing business by an agent within the Province these proceedings are void. If otherwise the agent should have been served. The company's property is not attached as that of the property of absent or absconding debtors, and as the agent was not served it follows that Mr. Wallace, for want of service of process cannot, as the case now stands, proceed to assess damages or take judgment. He is not in a better position as to this application, and I think that the appeal must be dismissed. Several other objections have been taken which I think are fatal to Mr. Wallace's claim, but it is not necessary to discuss them as the case stands.

I may add that section 31 provides that, under certain circumstances, the company or corporation may be proceeded against in the same way as in the case of absent or absconding debtors, but Mr. Wallace has entirely failed to show that these circumstances have arisen in this case.

BEALES *v.* CANADA FIRE & MARINE INSURANCE COMPANY.

New trial granted where the Judge made no formal charge to the jury and no charge was reported on his minutes.

THIS was an action on a policy of fire insurance, tried before JAMES, J., at Annapolis. There was a verdict for plaintiff and a rule granted to set it aside. No formal charge was given by the Judge to the jury, and none was reported, though the law was explained to them.

Graham, in support of rule, cites, on the point that the learned Judge did not direct the jury, *4 F. & F.*, 440; cites also *1 C. B.*, 470. (SMITH, J.—I think we cannot go outside of what the Judge has reported, and that you are shut out from taking the ground of misdirection, there being nothing to shew what it was.) See *18 C. B.*, 156, 354, 797; *17 C. B.*, 260. There has not only been a want of direction in this case, but a misdirection.

YOUNG, C. J.—I think you had better confine yourself to the non-direction.

Harrington, contra.—If the learned counsel desired to avail himself of this point, he should have raised it at the trial, and asked the Judge to direct on certain points. Where a Judge directs a jury it is different. Counsel cannot control what the Judge says, but where there is no direction, and counsel lies by and takes the chances of a verdict in his favor, he cannot afterwards raise the question. *Hilliard on New Trials*, 96; *L. R., 6 H. L.*, 591. (DESBARRES, J.—Can a Judge dispense with a charge unless he is asked to give one? SMITH, J.—That is not my difficulty. It appears that the Judge did say something, but there is nothing to shew what he did say.) If the Judge has charged and the ground is taken that there is misdirection, the onus is on the party appealing to get it there; *7 H. & N.*, 1006. In the case from *1 C. B.* 479, the Judge was requested to direct. The evidence is all one way. The question of fraudulent over-valuation was clearly put. The Court must consider whether a charge or the absence of it could have made any difference in the verdict.

There is a distinction between this case and *Archibald* v. *Taylor*. There an important point was withheld. Here every point was put, and the question is merely whether the Judge is obliged to write everything down. There is no law to compel him to do so. (SMITH, J.—How can we find out what was said?) The statute enables them to make an application on affidavit. (SMITH, J.—Here the Judge did not charge at all.) The minutes set out that certain things were said. The Judge says he did not make a formal charge, but I may reason on what he says he did do. If the Court decide to order a new trial, it should be without costs.

THE COURT adjourned for half an hour, and on returning, SIR WILLIAM YOUNG C. J., said the Court had looked over the leading cases cited, and were of opinion that there must be a new trial, though, under the peculiar circumstances, and as it was to a certain extent a new point, the new trial must be granted without costs.

THE QUEEN *v.* TOWN COUNCIL OF DARTMOUTH.

A *mandamus* was applied for, at the instance of the Sessions for the County of Halifax, to compel the Warden and Council of the Town of Dartmouth to assess on the property of the town liable for assessment the sum of $15,976 for its proportion of County School Rates for the years 1873--1878, under section 52 of the Educational Act, Revised Statutes, chapter 53.

Held, that the Warden and Town Council ought to have assessed in each year for the proportion of the County school assessment payable by the town, but that in view of the act to amend the act to incorporate the town, (1877, chapter 40,) section 30 of which provided that the sum to be voted at the annual meeting of the town for the estimates, including ordinary and extraordinary expenses, should not exceed in any year the sum of $15,000, there was a difficulty in the way of issuing the *mandamus* as asked for.*

Q. Whether there should have been a relator.

Per JAMES, J.—The City of Halifax is not exempted by chapter 32, Revised Statutes, from contribution to the County School Rates, but is equally liable with the Town of Dartmouth.

THIS matter came before the Court on a rule for a *mandamus* to the Town Council of Dartmouth, at the instance of the Sessions of Halifax county, to compel them to assess for County School Rates. The nature of the dispute between the Town and the County may be gathered from the report of the case, *In Re Dartmouth School Assessment*, 3 R. & C., 147 *q. v.* The

* The Court, having expressed an opinion on the maine question, suspended its final determination on the rule pending action by the Legislature in the premises.

motion for a *mandamus* was argued before SIR WILLIAM YOUNG, C. J., MCDONALD, SMITH and JAMES, J J.

Ritchie, Q. C., cites the Act of 1873, chapter 17, sections 27 and 28, Dartmouth Incorporation Act. The Council have power to assess for school and other rates. By section 36 the town is to be set off as a separate section. By section 37 certain other portions are united with the town for school purposes. These are all the sections I know of referring to school matters. A judgment was delivered in reference to the matter in 1878, reported in *3 Russell & Chesley*, 147.

Motton, Q. C., for the Town of Dartmouth.—The judgment of the Court was one such as the Town could not appeal from. They felt it necessary to have the deliberate opinion of the Court on the subject, and they were persuaded that, notwithstanding the former opinion, arguments could be presented now which had not previously been brought to the notice of the Court.

Rigby, Q. C., (with *Motton, Q. C.*)—We wish to take the objection that the County of Halifax has no legal position either as an individual or as a corporation. It has no legal existence. Proceedings cannot be taken in the name of the Queen unless some one is named as *relator*, who moves in the matter, and who is responsible for costs. Here we have Nepean Clarke, who calls himself Clerk of the Peace, and William Evans, who calls himself County Treasurer, but the County of Halifax, which they represent, is neither a corporation nor an individual capable of instituting proceedings. (JAMES, J.—A private individual may become a relator. YOUNG, C. J.—If a private individual asked for a *mandamus* in this case we would be slow to grant it.) Mr. Clarke, whose name is mentioned, is not a party interested.

YOUNG, C. J.—Is the City of Halifax interested?

Ritchie, Q. C.—It is specially excepted.

Attorney-General.—It stands in the same position as Dartmouth.

Ritchie, Q. C.—Cites *Gude's Practice of Crown Side, K. B.*, pp. 180, 181,; *High on Ex. Remedies*, 304, in relation to the issue of *mandamus*. A relator need have no interest.

Rigby, Q. C., cites, contra, *Fisher's Annual Dig.*, (1876,) p. 302; *44 L. J., Q. B.*, 85.

Ritchie, Q. C.—Where should it appear that there is a relator?

Rigby, Q. C.—It should be, "the Queen upon the relation of," etc. The affidavits in this case shew that Mr. Clarke is acting on the authority of irresponsible persons. We say the rule is improperly issued, and that there is nobody before the Court.

Ritchie, Q. C., reads Nepean Clarke's affidavit, also the affidavit of W. Evans, County Treasurer, on which the rule was taken out.

Motton, Q. C., reads the affidavit of Alfred Elliott, Town Clerk of Dartmouth, also the affidavit of Dominick Farrell, and of W. H. Weeks, Esq., Warden of Dartmouth. (McDONALD, J.—The question is one of law. What can you shew by these affidavits?) We can shew they are not entitled to $15,000. We will shew that Clarke has been collecting a very considerable portion of the money claimed. Section 27 of the Act to Incorporate the Town of Dartmouth is the first which refers to schools. Section 28 says they shall vote, etc., and shall have all the powers of the Sessions. We contend that after the passage of this act the Town of Dartmouth ceased to be a portion of the County. No language could be used stronger than that of section 28 to take the municipality entirely out of the County, or to shew that for school and other purposes it became separate and distinct from the County. There were certain County charges which they were still liable for and did pay. Mr. Ritchie only read a portion of clause 28. This is an application by the Sessions requiring us to assess a certain sum. We say that the Sessions have no authority, but that for school purposes we are the Sessions. An idea has prevailed that the City of Halifax is excepted. We contend that if Dartmouth is liable Halifax is liable also. We can only argue as to the construction of the act from the construction of existing acts. The city is only excepted "so far as hereinafter provided," and there is no provision following which excepts it. The words of the act do not bear out the marginal note, which has evidently led to the mistake. We contend that the language of the Dartmouth Act is much stronger.

The town is made a municipality, with all the powers which formerly belonged to the Sessions. (YOUNG, C. J.—The first question is whether it is a liability under the act, and the second who can enforce it?) Cites sections 36 and 37 of the act of incorporation. This act is unlike other acts of incorporation of municipalities, inasmuch as no other municipality is charged with the maintenance of schools outside of it. Dartmouth has the right to levy, appropriate and expend all moneys for school purposes raised in the municipality. (YOUNG, C. J.—Truro and New Glasgow have the same clauses, and no such construction has been contended for.) If the town were seeking to evade its fair share it would be different, but it not only supports all the schools in the town, but others beside. (MCDONALD, J.—Why should Dartmouth occupy a different position from others?) Because greater responsibilities are thrown upon it. (YOUNG, C. J.—You receive your share of the Government grant and of the thirty cents per head.) If it were not the intention of the Legislature that Dartmouth should have the exclusive control, where was the necessity for providing for all the machinery for collection and expenditure. Moneys levied in the municipality for school purposes belong to the town. (YOUNG, C. J.—Section 37 does nothing more than bring the outlying sections within the town for school purposes.) It does more, as it gives increased weight to preceding sections.

When the Town was being incorporated it was found that there were sections at either end which would be left unprovided for school purposes, and Dartmouth, in consideration of being relieved from County assessments, undertook to support these sections. (MCDONALD, J.—I do not see why the City of Halifax should be excepted, and I think the rest of the County has reason to complain. YOUNG, C. J.—Halifax is excessively taxed.) Dartmouth is taxed in proportion quite as much as Halifax, and to the extent of the outlying sections we are just so much worse off. Other municipalities have a clause similar to the Dartmouth 36th clause with the exception of Windsor. In the latter case the payment into the County Treasury is specially provided for. This has a good deal of significance. If it had been intended merely that Dartmouth should be a school section, it would have been enough to call it so, but it was

called a *separate* school section. The word "separate" indicated that it should be separate from the rest of the county The word has no significance unless it means this. The whole clause bears out this contention. The town has the exclusive expenditure of the moneys raised for school purposes. Where is the machinery to assess the inhabitants of the town and compel them to pay? There are no trustees to receive the moneys returned out of the amount raised. In Halifax there is an incorporated Board. There is nothing whatever to shew that the town is to contribute anything to the County. (McDONALD, J.—That is not the question. It is whether there is anything to repeal the law as it originally stood.) The amended act, chapter 40, Acts of 1877, repealed everything inconsistent with the Incorporation Act. If any interpretation by the Legislature is desired we have it in this clause and in the Windsor Act. (YOUNG, C. J.—You cannot get out of the real difficulty. The City of Halifax is expressly excepted, we think, from the operation of the Act. It is a very extraordinary thing, if the Legislature intended to relieve Dartmouth, that they did not clearly say so. If we apply the principle you contend for to Dartmouth, we must apply it to other towns which have never dreamed of asking for it.) My argument is that the language applying to Dartmouth is much stronger than that applying to Halifax. (McDONALD, J.—I cannot see the slightest ground for the contention that the City of Halifax is not excepted from the operation of the act. It is provided that the assessment is to be added to the regular assessment of the city. I do not mean to say that the exception is just. I think it is not. JAMES, J.—Would it not be reasonable to infer that the Legislature intended to carry out the same principle in regard to Dartmouth that they had already adopted in regard to Halifax? McDONALD, J.—It would have been a very simple thing for the Legislature to have said that the sections applying to Halifax should apply equally to Dartmouth.) A *mandamus* will not be granted if, when granted, it would be nugatory. (McDONALD, J.—Why should Dartmouth, because it has been incorporated, be placed in a different position from that which it occupied previously, and in a different position from Yarmouth and other towns?) Dartmouth is not only charged with the support of her own schools, but

schools outside the municipality. (McDONALD, J.—I do not attach much importance to that, because these sections are entitled to an allowance from the County and the Government, which Dartmouth is entitled to draw, and the difference is not much.) The amount received is insignificant compared with the additional burden. The population is sparse, and we must provide schools and teachers, whereas we are only reimbursed in proportion to the attendance. (McDONALD, J.—The town undertook to do those things. YOUNG, C. J.—It could not have been imposed without the consent of the town. McDONALD, J. —If your argument is sound you should not draw anything from the Government allowance. I think your contention, however, is wrong, and that you are entitled. Every school section is a separate section.) It is impossible to have a *mandamus* enforced, and the only remedy is by legislation. The Town of Dartmouth is not in a position to enforce it. See section 42 of the charter; Acts of 1877, chapter 40, section 30. The amount for which the Town can be assessed is limited by statute. The Court will not grant a *mandamus* if it will create confusion or disorder, or be vexatious or manifestly improper; *2 T. R.*, 336; *1 W. Bl.*, 59. The County of Halifax has permitted the deficiency to increase. There has been a large influx of people, and the result will be to make people pay who were not responsible. Dominick Farrell's affidavit shews that the County accounts, after paying all liabilities, shew an overplus of $4000, without charging the Town of Dartmouth.

Attorney-General, (with *Motton*, *Q. C.*)—Our argument is not that Halifax is not exempted, but that it is, and that Dartmouth is exempted by legislation following the same course and the same words. If Halifax is exempt, Dartmouth must also be exempt by virtue of the same language. The only difference is in regard to two sections which cannot affect this question. In regard to section 52 of chapter 32 of the Revised Statutes, there is nothing "hereinafter provided" in relation to the City of Halifax that is not enacted, by chapter 17 of the Acts of 1873, in regard to Dartmouth. (McDONALD, J. —It is provided that in Halifax the amount shall be assessed by the city authorities.) It is provided that in Dartmouth it shall be assessed by the municipal authorities. Section 100 of the

Public Instruction Act says that "the provisions of the chapter *except as herein otherwise specified* shall apply to the City of Halifax." In the case of Halifax we are to raise the money and expend it ourselves, and the same language is used in reference to Dartmouth. Sections 52 and 100 expressly refer to some other portion of the act, and do not in themselves create an exemption. Section 100 says Halifax shall be liable except where specially exempted, and Halifax is not more clearly exempted from school rates than Dartmouth is. Would sections 52 and 100 exempt the City of Halifax in any way of themselves? (YOUNG, C. J.—I think not.) If that is the case where is there anything, then, from section 52 to the end of the act that does create the exemption? (YOUNG, C. J. —Is not Halifax exempted?) I think it stands in the same position as Dartmouth. Sections 52 and 100 depend, for their effect, on the intervening sections, which are in no respect different from those applying to Dartmouth. (MCDONALD, J. —I do not think it affects the question before us that Halifax must be held to be in the same position as Dartmouth.) If Halifax is not exempt the County cannot get their *mandamus* because, in that case, our proportion would not be one-third the amount claimed. (MCDONALD, J.—Why should the municipality of Dartmouth be exempted?) I don't know, unless it is that it is expected to create a public spirit, and induce a larger expenditure. In Halifax we expend $80,000 a year. If the city had not the exclusive control of its own schools no one can suppose that it would raise or expend anything like that sum. (JAMES, J.—I am under the impression that the Town of Dartmouth, relying upon this exemption, has expended large sums on buildings.) Sec. 37 of the act of 1873 purported to do more than include the outlying sections. It preserved for the town the rates. The clause expressly transferred to the town from the County the power to levy and collect the assessment in those districts. (YOUNG, C. J.—The difficulty is not surprising. These incorporations are the loosest pieces of legislation I have ever seen. In New Glasgow they have established a Court for which there was not a shadow of law.) That was under a by-law. This was a part of the act and could not be considered a piece of carelessness. When the framers of the Act of Incorporation found that for upwards of

ten years the City of Halifax had been exempted under words similar to those in their own act, they may be excused for supposing that they could claim exemption also. Another question arose under section 37. It was contended that the *municipality* should pay over the thirty cents to the County. There was not a word to compel this in regard to the *outlying districts*, and the result is that the County authorities have gone there and collected the school rates, though the act expressly gives us the right. The Clerk of the Peace testifies that he computes the amount to be paid by Dartmouth from information as to the valuation of property by the Town Assessors. We contend that he has no right to use any such criterion. He has no material, and cannot, therefore, fix his rate. Section 52 requires the Clerk of the Peace to add to the sum voted for general County purposes a sum sufficient to yield thirty cents per head, but there is no provision enabling him to call upon the municipality for the amount so added, or upon the Warden or Council. Nor does it authorize him to take the Dartmouth assessment rate as the basis of valuation. In Dartmouth they have a different principle of valuation, and the result is entirely different from what it would be if the mode prescribed by chapter 21 of the Revised Statutes had been followed. Chapter 21 has no operation in Dartmouth. Property which would be exempt under that chapter is included and assessed. The assessment of Dartmouth is equal to that of the whole of the County outside of Halifax. Shipping is made assessable whether at home or abroad. This is not in in the general act. One thing complained of here is that the system of valuation being different in Dartmouth from that in the rest of the Province, it would be unfair to compute the assessment on that valuation. See *Tapping on Mandamus*, p. 16, as to the creation of disorder. It is not the practice outside of Halifax and Dartmouth to tax fishing plant. The Warden has no authority under the by-laws to assess the amount. The Warden and Council have no authority to levy any sums that have not been brought before a Town Meeting; *Act of Incorporation*, section 42. (McDONALD, J.—If they have no power to assess more than that, have we any right to compel them?) No. Have they neglected or refused the performance of any duty which the law imposes on them? This is

asking the officers of the town to do what they never could have done, even if they were willing. The present Warden and Council have no power to do anything. It is for the incoming Council. If they did levy an assessment it could be set aside.

A further difficulty in regard to the power to assess arises under sec. 30 of the Act of 1877, chapter 40, which says that in no year shall a larger sum than $15,000 be voted for ordinary or extraordinary expenditures, and no further sum shall be voted unless by legislative enactment. They have already, I think, assessed about that sum, or about $13,000, yet they are to be asked to assess, on pain of imprisonment, $15,000 more. In order to authorize a *mandamus* the sum must be clearly ascertained; *Tupping on Mandamus*, 17; *Reg. v. London and N. W. Railway Company, Fisher*, 5651, 5638, 5640; *2 D. & R.*, 689. It is alleged that the County is willing to pay back the proportion we are entitled to. To strengthen our contention that Dartmouth is separate we say they have no power to pay, and we have no power to receive or claim that proportion. The only authority there is is to pay the proportion to trustees of schools. Suppose it were necessary to ask the intervention of the Court to compel payment, could the Town Clerk or the Warden do it? Surely neither can be said to be in the position of a trustee. The Legislature could not have intended the town to pay this money and get none of it back, and yet there is no machinery to enable the town to recover it. The County Assessment Act gives another remedy if this liability exists, and if there is another remedy the Court will not grant a *mandamus*. Even where the Sessions have made a presentment, the Court has power to name a person, under sec. 57 of chap. 21, R. S., to levy and collect the rate; *Tupping on Mandamus*, 21. A remedy by amercement is sufficient to discharge the writ. This can only be recovered as a County rate, and if it be so the sections in reference to County assessment would apply.

Ritchie, Q. C., in reply.—As regards he question of relator see *Gude*, pp. 405, 653, giving forms of writ which show no reference to relator. The objection was that it did not appear on the face of the proceedings. See also *3 A. & E.*, 822, *The Queen v. Frost*. Two things are lost sight of. First, these rates are made

County rates, and also are rates raised for schools in the County and not in any section. They are County rates raised for no particular school, but distributed according to a scale. Chapter 24, section 62 varies the assessment slightly. It provides for the apportionment by the Clerk of the rates assessed in the County. By the 27th section the Dartmouth Council must assess the County rates. They are the only ones who can. They must assess this rate unless there is something to exempt them. I ask for a *mandamus* addressed to the existing Warden and Council. (McDONALD, J.—Suppose they change to-morrow?) I am supposing they don't change.

Rigby, Q. C.—If the writ lies at all it must be to the town, —the incorporation,—and not to the Council.

Ritchie, Q. C.—It is not the town, but the Warden and Council who are to assess. They are to assess whatever money is necessary. The 36th section provides that the Council have only the expenditure of money assessed for schools of the town. This money is not assessed for the schools of the town, but of the County. They have the expenditure of the Government and the school grant, which last is the portion of the thirty cents rate returned; Section 37. The County was not relieved from the outlying sections. They get the same as they always did. The town took the best portions of these sections, and left the poorest, which cannot support schools. The town never assessed those districts. The County did it, and handed over its proportion to the town. Now see the difference between that and the Halifax Act. See section 98 of chapter 32. In Halifax all money assessed for educational purposes must be paid by the City Treasurer to the School Commissioners. Even if the thirty cents were assessed in the city it would go, under that clause, to the Commissioners, being money assessed on property in the city for educational purposes. The Dartmouth Council has the expenditure of all rates assessed *for the schools of the town*, but the thirty cents is assessed for the schools of the *County*, not of the *Town*. (McDONALD, J.—It comes to the same thing.) I don't think it does by any means. They have not the expenditure of money raised for the schools of the County, but only their share of it. Reads Truro Act, Acts of 1874, chapter 47. It is precisely the same, and if Dartmouth is excepted Truro is too. In the New Glasgow

Act the school rates are specially excepted. In the Windsor Act, chapter 41, Acts of 1878, they have the expenditure of moneys raised "within the limits for the schools of the town," but must pay over to the County their just proportion. As regards the point that the *mandamus* would be nugatory because the Warden and Council could not assess,—the Town Meeting has nothing to say about anything but the extra assessment. The meeting has no vote on County rates or ordinary expenditure. It would be a perfect farce if it were otherwise. They might vote that they would pay nothing for salaries or any other purpose.

Attorney-General,—My point is that the in-coming Council can only assess what has been included in the estimates of the out-going Council.

Ritchie, Q. C.- The section is only for the purpose of giving the meeting an opportunity of expressing an opinion on extraordinary expenditure. The Warden and Council are bound to assess the County rates whatever they are, and not merely the sum named before the meeting. In regard to the alleged difference between the rate of assessment, I fail to see that there is any difference. They are precisely the same if the assessors do their duty. In regard to the argument that the population has changed, no law was cited, and a *mandamus* could never issue for taxes if that contention prevailed. In regard to the remedy by amercement, the only case where the Supreme Court can amerce is where the Sessions have failed to make a presentment. We are not asking them to assess for the outlying districts. We have tendered them a cheque for their proportion of that, and they have declined to receive it.

SIR WILLIAM YOUNG, C. J., now, (March 22nd, 1880,) delivered the judgment of the Court:—

This is a rule *nisi* for a *mandamus* requiring the Warden and Council of Dartmouth to assess on the property of the town liable to assessment the sum of $15,066 for its proportion of school rates during the years 1873, 1874, 1875, 1876, 1877 and 1878, under section 52 of the Educational Act, Revised Statutes, chapter 32, about one-third of which, if assessed, would revert to the town, leaving a balance of about $10,000

claimed by the Sessions for distribution under sections 52 and 53. It is a question, therefore, between the other, and for the most part the poorer sections of the County, and the Town of Dartmouth, in which the City of Halifax has no part, being exempted by sections 52 and 100 from the payment of thirty cents a head imposed by section 52. Much was said at the argument about the policy and the injustice of this exemption, while the liability of Dartmouth, if there were a liability, continued, but it is obvious that this is a matter for the Legislature with which we have nothing to do. We are called upon to determine the true construction and meaning of the Act of 1873, chapter 17, incorporating the Town of Dartmouth, and the amending Act of 1877, chapter 40. This same question was brought before us last year at the instance of the Sessions, and the Court gave the judgment reported in *3 R. & C.* 147, with which the Town Council were dissatisfied, and the present proceeding was of necessity adopted by the Sessions. It happens, too, that the kindred act incorporating the Town of New Glasgow, with its by-laws, has come, in two cases, under discussion, one during the last and one in the present Term, and raising some of the questions which throw light upon the case in hand. There are acts also incorporating the towns of Truro and Windsor, all of them constructed nearly on the same principle and subject to like difficulties and objections. In the three judgments I have already delivered and the grounds of which I abstain from repeating, most of these objections are stated, and looking at the Dartmouth acts and by-laws it is obvious that many of them extend to this case.

Our common schools, under chapter 32, derive their support from three sources; first, from the Government grant of $117,000, under section 41; secondly. from an addition, under section 52, to the annual vote of the Sessions in each County for general County purposes, of a sum sufficient, after certain deductions, to yield an amount equal to thirty cents for every inhabitant of the County, the sum so added to form and be a portion of the County rates; thirdly, under section 73, from the sums voted at the annual meetings of the sections held for the election of Trustees, and for determining the amount that shall be raised in each to supplement the sums provided by the Province and County. The act also creates the machinery by

which the business of public instruction is carried on. Sections 84 to 100 provide a special system for the City of Halifax. Special provision, too, was needed for the incorporated towns, but this has been left to their own choice, and it is difficult to say how much or how little of the act remains in force within their respective limits. The Dartmouth Act, 1873, cap. 17, in the 27th section, gives the Council jurisdiction over the support and regulation of the public schools, and the appointment of the teachers, and, by the 28th section, the Council shall vote, receive and pay whatever monies are required, *inter alia*, for school rates, and shall have within the town all the powers relating thereto vested in the Sessions, Grand Jury, School Meeting and Town Meeting. The powers of the Commissioners of Schools are thus transferred to the Town Council, and Trustees are no longer to be appointed. By the 35th section the then school house became the property of the town, and by the 36th section it is declared that the town shall be set off into a separate school section, and the town shall have the expenditure of all school rates raised within the limits thereof for the schools of the town, as also of all Government and school grants for such schools, which shall be paid to the Council,—grants, let me ask, from what funds, and by and to whom paid? From the Government, drawn from the Treasury under section 41, and from the Sessions, drawn from the assessment equal to thirty cents a head, under section 52. This view of the section,—and it is susceptible of no other,—is decisive of the question, as it seems to me. In the Windsor Act, 41 Vic., chapter 41, passed 4th of April, 1878, two months after our former judgment to the same effect was delivered, the 38th section has a proviso which I look upon as affirming it, for the Legislature would never impose upon one town an impost which they had not imposed on the others, and ratified by so invidious a distinction an exemption which Dartmouth alone of the incorporated towns has laid claim to. They have made the duty, under the 42nd section of the Act of 1873, imperative on the Council to furnish an estimate of the expenses for the current year, including the County rates of the town for the incoming year and the amount required to defray the same, which sum the in-coming Council shall assess, with any additional sum affirmed by the rate-payers. The County rates in this section, I cannot

bring myself to entertain a doubt, comprehend the additional rate arising out of the thirty cents impost. As the town is to receive a proportion of the fund, so also must they contribute to it.

Let us now consider the objections to the form of proceeding. The writ of *mandamus* is of familiar use in England, as appears by the numerous examples occupying upwards of two hundred pages in the Treatise by *Tapping*. In this Province it has been rarely resorted to, notwithstanding the facilities afforded by our Equity Act, Revised Statutes, chapter 95, sections 44 to 49. In the case of Justices it is superseded by the summary method presented by chapter 112, section 13. The latest case I have seen upon the subject was in the House of Lords in 1876. *The Queen* v. *Churchwardens of All Saints, Wigan*, L. R., 1 Appeal Cases, 620, where Lord CHELMSFORD said; "A writ of *mandamus* is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ, not only upon the merits, but upon some delay or other matter personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned. So in cases where the right in respect of which a rule for a *mandamus* has been granted upon shewing cause appears to be doubtful, the Court frequently grants a *mandamus*, in order that the right may be tried upon the return; this also is a matter of discretion. But where the Judges grant a peremptory *mandamus*, which is a determination of the right, and not a mere dealing with the writ, they decide upon the merits of the case, and not upon their own discretion." In *The Queen* v. *The Mayor of Peterborough*, cited at the argument from 44 L. J., 86, "It is clear," said BLACKBURN, J., "that the person applying for the prerogative writ of *mandamus* must shew that he has a real interest in the subject of it, and that he is *bona fide* in making his application. See also *Selwyn's Nisi Prius*, chapter 27; *1 Chitty's Practice*, 789. In *Rex* v. *London and N. W. Railway*, 16 Q. B., 886, Lord CAMPBELL said; "A writ of *mandamus* supposes the required act to be possible, and to be obligatory when the writ issues. In the present case," he added, "the prosecutors were guilty of laches by giving no

notice till the power of doing the act had expired, and not applying for it for a considerable time after the power had expired."

Let us apply these principles to the circumstances of the case in hand. We have decided that on the true construction of the Education Act the Town Council of Dartmouth ought to have assessed the town in each of the six years from 1873 to 1878 in the sums specified in the notices served upon them in each of these years by the Clerk of the Sessions and disregarded. I do not at all question the good faith with which they resisted those demands, believing them to be illegal, nor their anxiety to expend judiciously and to the profit of their own rate-payers all the money they could afford for education. This does not justify them, if the law will not, in withholding the aid they ought to have contributed to the school sections in the poorer districts. Neither does the very inadequate contribution of the country districts, through assessments far below the cash value of the property therein, afford an excuse which this Court can accept. The 30th section, also, of the amending Act of 1877, stands in the way of the large assessment that will now be required, unless specially authorized by legislative enactment. This section was framed, and as the law assumes, at the instance and with the assent of the corporation, recognizing no such liability. We must again suggest, as in our former opinion, that resort should be had to the Legislature, where the new municipality and the Town Council can be heard with a view to the equities as well as the law of the case. Our duty lies only with the law, and that, as I think, is entirely with the Sessions.

So far the Sessions, representing the outlying districts, and now the municipal body representing the Sessions, have the right, and we are aware of no other mode by which they can enforce it except a writ of *mandamus*. It was urged that there ought to have been a relator liable for costs, and the counsel of the Sessions offered to supply one if we required it, but in the case of a public body having a duty to fulfil and a direct interest in the result, a relator does not seem to be necessary. Still, with a view to the cases I have already cited, and to that of *The King* v. *The Bishop of Ely*, 1 W. Blackstone, 581; *1 Wilson*, 268, it is obvious that there is a serious difficulty

in the way when the right is sought to be enforced. The rule *nisi* asks that the writ of *mandamus* shall issue directed to the Warden and Council of Dartmouth, directing and commanding them forthwith to assess upon the property within the Town of Dartmouth liable to assessment the sum of $15,-976, and collect the same, and pay it over to the Treasurer for the County of Halifax.

Now, we must ask ourselves, how is this requisition, if made, to be obeyed? The demand has swollen to this large amount, the accumulation of six years, from a reluctance on one hand to enforce, and on the other to admit the claim Some time has been spent in litigation, our first judgment having been rendered two years ago. But the grand difficulty arises out of the language of the incorporating and the amending acts, neither of which, and especially the latter of the two, has any reference to this special burden. Had it been recognized at once in 1873, as the Legislature must have intended, it might have been murmured at, but could not have pressed so severely. In 1877 it was entirely lost sight of, for the 30th section of the act provides that at the annual meeting of the rate-payers the sum to be voted for the estimates, including ordinary and extraordinary expenses, shall not exceed in any year the sum of $15,000, and no additional sum shall be expended unless specially authorized by legislative enactment.

Under these peculiar circumstances, we have decided on the only course that seems to be open to us. It will be for the Legislature to reconcile this apparent contradiction, and having given a decided opinion on the main question, we suspend in the meantime our final determination on the rule.

JAMES, J., delivered the following opinion:—

The Legislature has provided that the public schools of the Province shall be supported from three different sources;

First. A specific sum of money, voted for the purpose out of the general revenue, which is divided among the several counties in certain proportions, and the grant for each county is sub-divided among the schools of that county, so that a portion is allotted to the support of each school.

Secondly. An assessment upon each county, to raise a sum equal to thirty cents per head of the population; the amount of which is divided among the several Boards of Commissioners of Schools for the county, and by them subdivided among the school sections in the several districts in proportion to the attendance, so that each school receives a share.

Thirdly. A local assessment in each school section of a sum sufficient to make up the balance of the expense of maintaining the public schools in the section.

The object of this complex system was exceedingly beneficent. It was felt as the greatest difficulty in introducing a general system of education that, while the richer and more populous towns and settlements could maintain their schools with efficiency without any serious burden, a great many, perhaps the majority, of the school sections would be unable, owing to their being thinly settled and poor, to maintain efficient schools, and in many of them no provision whatever would be made for the education of the young. Their resources for this purpose were therefore supplemented by grants to each school—first, from the Provincial Treasury, and secondly, from the County Assessment; thus compelling the richer sections to contribute towards the education of the young in the poorer sections.

The operation of the Act in this respect has been most satisfactory, and the object of providing the blessing of a free education for every child in the Province has been very successfully accomplished. Under its operation hundreds of schools have been organized and sustained which, were the supplements from the Treasury and the County Fund withdrawn, would necessarily be closed. Of all the counties in the Province Halifax stood most in need of this humane arrangement. It is about 100 miles in length and 25 or 30 in breadth. It contains one city, (Halifax), one small town, (Dartmouth), and but one moderately prosperous agricultural settlement, on the Musquodoboit River. The whole population is about 56,000, of whom about 30,000 are in Halifax and 4,500 in Dartmouth. The remaining population of some 22,000 are very scattered, poor, and in many cases the school sections are thinly inhabited, and therefore in need of all the

assistance intended for them by a beneficent Government. I find by reference to the affidavits that the amount added to the county assessment for school purposes for several years past has been $8,214 annually. It also appears by the affidavits that the assessable value of real estate for county rates for the current year is as follows:—

City of Halifax	$15,604,000
Town of Dartmouth	1,325,000
Remainder of county about	2,000,000
Making in all about	$19,000,000

The amount now raised under the supposition which has prevailed, viz., that the city is exempt by law from this taxation, is paid as follows:—

City	nil
Dartmouth	$3,244
Remainder of county	4,970

The Education Act requires that an amount shall be raised equal to 30 cents per head of the population, but the $8,214 raised represents the tax, not on the whole county, but on that portion of the county outside of the city, with a population of about 26,500. If the population of the city were added, the amount to be raised, would on a population of 56,000 amount to about $18,000, of which the

City would pay	$14,830
Dartmouth	1,260
Remainder of county	1,910

Enormous as is this disproportion between these figures and the present actual taxation, the disproportion is greatly increased when we look at the distribution of the fund as prescribed by the Act. In section 53 it is enacted that the amount raised by County Assessment shall be distributed among the schools in proportion to the average attendance of pupils in each school. I have no means of ascertaining what that average attendance is for the various schools in this county, but in the absence of this information, I may fairly presume that the attendance at the schools is pretty nearly in the ratio of the population. Of course there will be differences in different sections, but for my present purpose I am

justified in assuming that the ratio is nearly the same all over the county On this assumption the sum of $18,000 would be distributed as follows:—

City of Halifax, about		$9,557
Dartmouth,	"	1,443
County	"	7,000

Therefore if the assessment were levied and distributed according to the Education Act, the city being included, the city of Halifax, Dartmouth and the rest of the county would respectively receive and pay as follows:—

	Payments.	Receipts.
City	$14,830	$ 9,557
Dartmouth	1,260	1,443
County	1,910	7,000
		$18,000

Adopting the same ratio for distribution under the present system,—that is the ratio of population,—the amounts distributed must be, Dartmouth about $1,394, county about $4,858; so that Dartmouth under a fair carrying out of the general laws of the Province would pay $1,260, and receive back $1,443.33, or $173 more than she would have to pay; whereas, if the city of Halifax is exempted, Dartmouth receives back only $1,394 but has to pay $3,245 annually, or $1,851 more than she receives. The difference to Dartmouth is therefore over $2000 per annum in all time to come, in addition to the $15,000 now demanded. The remainder of the county which, under a fair system, would pay $1,910 and get back $7,000, (balance $5,090,) now pays $4,970 and gets back only $6,857, (balance $1,887).

The county outside of Halifax and Dartmouth therefore pays the difference of these balances of $5,090 and $1,910, that is, $3,180, which is taxed on a population of 22,000; but Dartmouth is much worse treated, being taxed unjustly over $2,000 annually on a population of a little over 4,000. I say "unjustly" taxed, because I can see no reason why the city of Halifax, even if she did not derive a large part of the trade to which she owes her wealth from the industry of the 26,000 fishermen and farmers inhabiting the outlying sections of the county, should escape taxation to support the schools of the

county, while the people of Dartmouth are taxed for that purpose annually about four dollars for every family in the town.

The foregoing calculations are made from the figures furnished the Court on this application. More accurate information to be obtained at the public offices, and more exact calculations may vary the results to a trifling extent, but I am sure not materially. Considering, then, that the town of Dartmouth is called upon to pay a taxation, over and above her fair proportion, of over $2,000 annually, besides an arrear of $15,000, a sum far exceeding her whole gross annual revenue, and nearly approaching the present debt of the town —the interest of which added to the $2,000 extra taxation will increase her annual burden to the extent of over $3,000 a year, which is equivalent to an increase in the debt of the town of $50,000, the whole of which is imposed in order that the city of Halifax may be relieved from a burden which is cheerfully borne by every other town, village and hamlet in the Province, it is not wonderful that the deepest dissatisfaction and alarm prevail in the community of Dartmouth in relation to this matter. They have never been able to conceive it possible that so monstrous an exaction could ever be enforced against them in a country where the laws are generally not only just but humane, and they would be grieved to learn from the decision of the Court that the law which ought to be just before it is generous, in seeking to be humane has become unfair, partial and oppressive. Believing that the idea of their being seriously called upon for this large amount of arrears, besides a very large addition to their annual taxation since they became incorporated, was chimerical, they have refused until compelled by law, either to assess the tax or to receive the subsidy from that source, and have gone on erecting school houses and employing teachers on a liberal scale,—a scale not inferior, in proportion to their wealth and numbers, to that of any other town in the Province. Among other things, they have for many years maintained in the town a thoroughly efficient High School, an attainment which the city of Halifax was unwilling to afford till within the last year, and which is still not quite a successful experiment. Under the idea that they were exempt, as the city of

Halifax is usually supposed to be, from this tax, they even consented to have included in the town by their Act of Incorporation, for educational purposes, two poor districts outside of the limits of the town, which would otherwise be unable to maintain schools. The people of Dartmouth, therefore, are not trying to shirk a burden imposed on them, as on every other town in the Province, for beneficent purposes. They are acting on the defensive to prevent and remedy a great wrong to themselves and all the rest of the county. Unjust in the extreme as is the exemption of the city from the county school assessment, its injustice and inconsistency are greatly enhanced by the fact that, while escaping the county assessment, the city of Halifax takes her full share of the Provincial grant. This, like the other, was intended mainly as an equalizing arrangement for the benefit mainly of the poorer sections. It is contributed to the revenue by the whole population; the poor, as is well known, paying a much larger amount, in proportion to their means, than the rich. The exemption of the city, if it was at all intended by the Legislature, was based on the idea that they were to support their own schools independently of external aid. The amount of Provincial money allotted to the city is stated by the Superintendent's report for last year at the sum of $9,500. If the same principle had been adopted as in the case of the county assessment, the city should have been required to support their own schools independently of the Provincial grant as well as the county assessment, and the amount of Provincial money to which they would otherwise have been entitled should have been divided among the poorer school sections, as some compensation for their greatly increased taxation, owing to the exemption of the city from the county assessment. For what distinguished services to the Province the city of Halifax has enjoyed this remarkable exemption for some sixteen years I know not. What, with interest, has been its total amount, I leave for others to calculate; but I am sure that the annual saving to the finances of the city during any one of these years would have enabled her to pay the salaries of at least two additional professors in Dalhousie College, after deducting the amount necessary to place the

College grounds in a condition still more attractive to distinguished strangers visiting the city than they are at present.

I shall now briefly consider the question whether the town of Dartmouth is liable in law for the amount claimed or any part of it. This question has been so fully discussed by the learned Chief Justice, in an opinion in which, so far as it defines the natural construction of the Statutes, I entirely concur, that not many words will be necessary from me on that point. There can be no doubt that the framers of the Dartmouth Act of Incorporation intended and expected that their town would be exempted, as the City was supposed to be. There are several features of the Act which indicate that that was their intention. But was that the intention of the Legislature as expressed in the Act of Incorporation? In considering this question, I think I am bound to require that any language that would exempt one locality from the payment of a tax imposed upon the whole of the rest of the Province, with at most but one exception, should be clear and explicit, but I find no clear and explicit words in the statute to this effect. On the contrary, I find in section 36 and 37, language which appears to me totally inconsistent with such contention. Keeping in mind that the schools in each school section are to be supported from three sources, viz:—the Provincial Grant, the County Assessment, and the Local Assessment, I observe that section 36 is as follows:

"After the passing of this Act the Town shall be set off as a separate School Section, and the Town shall have the expenditure of all *school rates raised within its limits for the schools of the Town*, as also of all *Government and school grants* for such a Town, which grants shall be paid to the Town."

Here we find the three sources of educational income clearly, as I consider, specified in detail, viz: 1—Local assessment. 2—Government grants. 3—School grants. And the two latter grants are to be "paid to the Town." Now we know, of course, that the second of these, the government grant, means the grant out of the Provincial treasury. But what is the third, the school grant, if not the share allotted to the town out of the county assessment. I can conceive of no other meaning for the words, and therefore the town is to receive and expend

its proportion of the county assessment. It is not contended that the town is to receive a proportion of this fund without contributing to it. That would be taxing the poorer districts of the County to assist the richer, and I am sure the people of Dartmouth have no such desire, and would never ask such a thing, and their counsel have raised no such contention at the argument. All they ask, and all their counsel have contended for, is that if the city of Halifax is exempt, Dartmouth should also be exempt, and this they are, in all justice and equity, bound to insist upon, not only in their own behalf but in behalf of the rest of the County, who, like themselves, are unjustly taxed to subserve the interests of the city of Halifax. It is clearly the interest of Dartmouth that neither should be exempt.

Again, in section 37, I find that for the two adjoining districts included in the Town for school purposes by this section, the "Council shall be paid the proportion of *Government school grants* payable in respect of such districts, and to impose and levy the *County School Assessments*, and all *School Assessments*, in such districts, and collect the same in the same manner as if such districts formed part of the Town. I find nothing in the Act to countervail these explicit statements. I can only say that if the framers of the Act intended, as I have no doubt they did, to exempt the Town from the County Assessment, they have made a most unfortunate use of the English language. I hope the Town will not longer persist in an expensive and hopeless contention in the Courts of Law to escape this assessment which the city and Dartmouth ought both to be willing to bear, but look to the Legislature to remedy in another way the severe taxation inflicted on them by the law, and which they are quite unable to bear.

It is indispensable, in my view of the law and facts, that I should decide, so far as I am able upon the arguments presented to us, whether the City of Halifax is exempt or not. The question was partially discussed at the argument, and I have given it full consideration. It is nowhere expressly enacted that the city shall be exempt from the tax. It is rather the result of a close and careful examination of its clauses, which were cautiously framed with that intention. Were this an act of Parliament unobjectionable on moral grounds, it is possible

that it might be construed so as to exempt the city. But this is not an Act of Parliament unobjectionable on moral grounds; it is an Act to impose upon one district a tax which ought justly to be paid by another. It is a statute, if that be its true construction, violating the first principles of natural justice, and perpetrating a moral wrong; and such a law cannot receive that construction unless such meaning appears in express words, or by necessary implication. Nowhere in any statute of this Province, is it stated that the city of Halifax shall be exempt from this tax, or words expressly to that effect, or which can receive no other construction. All the expressions relied on are merely inferential, and may easily be otherwise construed. This principle is clear and undoubted, and has been recognized and applied by this Court to the construction of statutes in the two most important cases that have been argued here in the last three years. I have already applied it above against the defendants' contention. It is equally applicable to the city; for in neither case are there express words of exemption, or any clear or undoubted inferences to that effect. Were the law as is contended, had it been properly represented, it would never have received the Royal assent, as no Statute ever will that arbitrarily taxes one section of a country, and without any reason exempts another; still less when one section is made to bear a largely aggravated burthen to relieve another, as in the present case.

I am strongly inclined to believe that if the question of the exemption of the city under the Education Act ever comes in litigation before this or any other Court, it must be held that the city is not exempt.

It is quite true that the Legislature never could have intended to enact one law for Truro and New Glasgow, and another for Dartmouth. It is equally impossible to believe that they intended to tax the people of Dartmouth, and exempt the far more wealthy community on the opposite side of the harbor.

If I am right in this opinion, it has a most important bearing on the liability of Dartmouth. I have no doubt whatever that Dartmouth is not exempt from taxation, but if the city is illegally exempted, and if the whole arrear claimed against the town has been caused by that illegal exemption of

the city, then there are no arrears due from Dartmouth; because had the law been carried out in the case of the city, Dartmouth, instead of contributing a balance to the fund, would have received from it some two hundred dollars annually, over and above her contribution to it; and if this be the law Dartmouth is entitled to recover back some $15,000 or $20,000 for taxes paid from the passing of the Education Act down to 1873, that is, for the whole period during which the city of Halifax has been exempted by the county authorities from the payment of the tax, up to the date of the Incorporation of the Town of Dartmouth, when resistance was first made to the tax.

It was contended for the defence at the argument that, as the Act to incorporate the Town of Dartmouth expressly prohibits the Town Council from assessing anything beyond the current annual expenditure, except upon a vote of the ratepayers at a public meeting, and then only for public improvements, a writ of *mandamus* would be nugatory, and therefore ought not to be ordered by the Court; and several authorities were cited to this effect. But as the writ in this case would not only command an impossibility, as in the case cited, but an absolute illegality, I think it unnecessary to refer to the cases cited. That the high power and authority of this Court cannot be invoked to compel a subordinate authority to violate the law, is a proposition which appears to me self-evident, and which requires no authority to support it. We must, therefore, either discharge the rule *nisi* for a *mandamus*, or suspend our decision upon it until there shall be a change in the law relating to the subject under consideration. Under the circumstances, I concur with the learned Chief Justice that if there be any arrears legally due, the latter course is one which meets the necessity of the case.

The matter will doubtless now be brought before the Legislature by one or other of the parties concerned, and will then be judged on the principles of right and justice. Our duty is to expound the law. If the law is unjust we cannot alter it, but those who make the laws have not only the power, but it is their solemn duty to amend them if they are unjust or inequitable, as I am satisfied the law of taxation now is if the construction which has heretofor

put upon it is correct. The question before the Legislature will be whether Halifax and Dartmouth shall be both exempt, or, on the other hand, whether Halifax and Dartmouth shall be both included in the assessment. The proposition that Halifax be exempt and that Dartmouth shall be taxed to supply the duty which the city of Halifax owes to the county of Halifax, is simply preposterous, and will be so held, whenever the city of Halifax is called upon in any Court of Justice to pay up the fifty or eighty thousand dollars of taxation which she has hitherto escaped through a mistaken interpretation of the law. I concur with the course of dealing with this application indicated in the opinion of the learned Chief Justice. I ought to add in conclusion that as I am resident of Dartmouth, and own property there, I thought I ought to be excused from sitting on this case, but my learned brethren thought otherwise, and therefore I have very reluctantly been drawn into this discussion in deference to their opinions. I have endeavored to divest myself of prejudice in the matter, and to give a decision in accordance with the law, and I believe that I have succeeded in doing so.

COLLIE *v.* MOREN.

THE power conferred on the Court by Revised Statutes, chapter 109, section 22, to enforce obedience to an award made under a voluntary submission cannot be exercised by a Judge at Chambers.

SIR WILLIAM YOUNG, C. J., dissenting.

THIS was an appeal from an order of a Judge at Chambers directing judgment to be entered on an award made on a a voluntary submission, and was argued this term before SIR WM. YOUNG, C. J., MCDONALD, SMITH and WEATHERBE, JJ.

McCoy, Q. C.—The only question is as to whether, under section 22 of chapter 109, *R. S.*, a Judge at Chambers has power to enter judgment on an award, there being no cause in Court.

A dispute took place between Collie and Moren, and by consent the matter was referred to arbitrators, who made an

award in favor of Collie. There was no cause before the Court, and application was made to His Lordship the Chief Justice at Chambers for a rule to enter judgment. The Chief Justice, having doubts as to his power, ordered an argument before the full Court. This was had, and the Court being equally divided a re-argument was directed. My ground is that a Judge sitting at Chambers cannot grant a rule to enter judgment on such an award.

The rule of Court was made under *R. S.*, chap. 109, sec. 22. All the other sections of the act expressly say "the Court or a Judge," and refer entirely to cases where there is a cause in Court. See sections 6, 7, 11, 12, 15, 16, 19 and 20. There the Court or a Judge has full power over the cause and may refer it back if necessary. *Smeaton* v. *Collier*, 1 Exch., 457, is the leading case. In the English cases where there is a submission under an order of Court, the Court can enforce obedience, without judgment, by issuing execution in the first instance on the award, or may order an attachment after a demand. In *Day's C. P. A.*, 203, the English act is given. *Ch. Arch.*, 1598; *2 Dowl.*, 114; where the power is in the Judge and not in the Court, the Court only has jurisdiction. See also *9 M. & W.*, 42; *7 C. B.*, 770; *Russell on Awards* 634. As to English practice see *Fisher's Dig.*, 308; *9 C. B.*, 250.

Tupper, contra.—Most of the cases have been gone into before. My construction of the 22nd clause is different from Mr. McCoy's. He reads the Act as if it had all been passed at the same time, whereas, in fact, the clauses were passed at different times. Page 146 of *R. S.*, section 6, 1st series, gives the analogous clause. There there are only seven clauses, and the clause in question is very much the same. Every case will be found to construe the word "Court" as meaning either "Court" or "Judge." No stronger case has been cited than *Smeaton* v. *Collier*. In that case it is held that the moment a statute gives the power to the Court the Judge has it. See *Harrison's C. P. A.*, citing *Smeaton* v. *Collier* and other cases referring to the distinction between Judge and Court. *Ontario Digest*, 169. The clause should be read as if the word Judge were there. It does not necessarily mean that the Judge is to have all the powers of the Court.

The Court now, (March 27, 1880,) delivered judgment:—

SMITH, J.—The only point in this case, as it was presented to us at the argument, and to which the authorities cited refer, is as to the power of a single Judge to direct a judgment to be entered under sec. 22, cap. 109 of our Rev. Statutes, in case of awards on voluntary submissions. I have looked with care into the cases on the subject of the powers of a single Judge at Chambers, and they clearly establish that where a statute in general terms, without any limitation, express or to be implied from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers. There are several cases to this effect, one of the most leading of which is *Smeaton* v. *Collier*, 1 Ex., 457. PARKE, B., there said; "when, therefore, a Judge exercises the duties which belong to the Court, it is to be taken that he is to exercise them in the same manner as the Court itself, unless there is something in the context of the act which leads to a different conclusion." The question here is, in view of these authorities, is there anything in the context of our statute which indicates an intention of the Legislature to give the Supreme Court, and not a single Judge, the power to enforce obedience to awards under the section referred to? I regret that I have not been able to reach the same conclusions upon this point as have some of my learned brethren. I regret it not only because it would afford me gratification to agree with opinions for which I have much respect, but it is readily to be perceived that the efficacy of awards must be necessarily impaired by depriving a single Judge of the power of enforcing them. Yet, whether intentionally or by mistake, I think the Legislature has clearly done so if we apply the principles applicable to the construction of statutes. In *Dwarris on Statutes*, p. 182, it is laid down that "in the exposition of a statute the intention of the Legislature may be discovered from different signs, but, as a leading clue to the construction to be made, it is to be collected from the words used. And while, as before stated, it is a fundamental maxim that effect ought to be given to the intention and object of the framers, it must now be added, in order to give such rule its full signification, that it must be such an intention as the Legislature have used fit words to express." And again in note 3 on the same

page; "It is only in cases where the meaning of a statute is doubtful that Courts are authorized to indulge in conjectures as to the intention of the Legislature, or to look to consequences in the construction of the law. When the meaning is plain and unambiguous the Act must be carried into effect according to its language, or the Courts would be assuming legislative authority." In the light of these principles let us enquire from the *words used* in our statute to whom the Legislature intended to give the power to enforce obedience to awards under the section in question. Applying my own judgment to the phraseology of the clause, I cannot see either the wisdom or utility of so circumscribing its operation. I have already said it is the reverse of beneficial in its application, yet I cannot see how this Court can enlarge it in the face of so plain and significant a difference in the several clauses, in eight of which the words "a Court or a Judge" are used, distinguishing them in so marked a manner from sec. 22, in which the power is conferred upon "*the Court*" alone. Is not this something, to use the language of PARKE, B., in *Smeaton* v. *Collier*, "in the context of the Act," indicating an intention on the part of the Legislature not to give a single Judge the power under this section? It appears to me most plainly to do so, as I cannot read the several provisions of the Act without arriving at this conclusion, or adopting the unpleasant alternative of supposing the Legislature were ignorant of what they were enacting.

SIR W. YOUNG, C. J.—The award in this case being unassailable, and the submission having been made a rule of Court under the Revised Statutes, chap. 109, sec. 21, the sole question is whether, under the 22nd section, a Judge at Chambers can give judgment and enforce the award. He can do so on a compulsory reference by sec. 13, but it is urged that he cannot in the case of voluntary references under sec. 22, which speaks only of the Court. This section is an addition to the English Act, and may be fairly construed by itself independently of the others; and to impose upon it the limited construction contended for would be highly inconvenient, and, where the Court is in vacation from April to December, as a full Court, it would greatly diminish the value and the

security of awards. The case of *Smeaton* v. *Collier*, 1 Exch., 457; *5 D. & L.*, 584, is, I think, decisive upon the point. In that case POLLOCK, C. B., said; "Where the Legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose; and it is intended that the Judge should exercise those powers. No distinction exists between powers conferred by statute and those existing at common law, unless a distinction is to gathered from the terms of the statute. Many statutes might be pointed out which contain the distinction. Where a motion is to be made in open Court in *Term time*, it may be urged that the Legislature contemplated that such authority should be confined to the Court. This was so in the case of *James* v. *Fitzaddam*, which was cited for the plaintiff. The view I have been disposed to take is this, that where an authority is given to the Court by an Act of Parliament, the Court may exercise that power in the same manner as it may exercise any other powers, unless there be something in the act itself which imports that this power is conferred with a special limitation." And PARKE, B., said; "In the construction of the act we must hold that the Courts may exercise the power given to them by it in the common and ordinary way, unless it contain something to the contrary. When, therefore, a Judge exercises the duties belonging to the Court, it is to be taken that he is to exercise them in the same manner as the Court itself, unless there is something in the context of this act which leads to a different conclusion. As for example, in the 43rd George III., chapter 46, where the enactment is that the motion is to be made in open Court, it is clear that the Judge is not to have any power in the matter. Again, in the 48th George III., chapter 123, it is enacted that the application must be made in Term time to one of the Superior Courts, which shews that the Legislature intended that the power should be exercised by the Court, and not by the Judge. So in the Interpleader Act, the first section states that it shall be lawful for 'the Court or any Judge thereof' to make rules or orders, but the eighth section enacts that 'the Court' shall have power to call the parties before them 'by rule of Court.' This shews that the Legislature contemplated a distinction between the powers to be exercised by the Court and the

Judge. By the application of this principle of conviction to the present statute, upon which this question arises, it seems to me it is not limited to acts done in Court, and therefore that my brother PLATT clearly had authority to make this order."

The same principle was applied to the power of a single Judge to direct the trial of a prisoner for robbery by the Sessions, in which ERLE, J., said; "As far as the question of jurisdiction goes, I see no difference between proceedings upon an indictment for felony and any other proceedings, and I am clearly of opinion that it has been the practice for a single Judge at Chambers to order a *procedendo*. I do not see any express provision in the statute *6 Henry 8*, chap. 6, rendering it necessary that the application for such writ should be made to the full court. The statute seems to make the matter one of ordinary jurisdiction."—18 Q. B., 773.

The power of a Judge at Chambers in enforcing obedience to an award would be exercised, of course, with caution, and where it was to be disputed it would generally, as in this case, be remitted to the full Court. But where, under our system, a single Judge sits on circuit, armed with the full power of the Court, often without appeal, there is no danger in entrusting him, subject to appeal, with a jurisdiction over awards.—(See, also, the cases in *1 Dowl*, 275; *3 Dowl*, 699, and *6 M. & W.*, 145, as to the authority of a Judge at Chambers).

DESBARRES, J.—Looking at the 22nd section of the Act referred to, it appears to me that, under that section, a Judge at Chambers has no power to enforce an award. So far, I agree with my brother, SMITH. But there is another question which is, perhaps, worth some consideration. That is the question referred to by His Lordship the Chief Justice, whether, when a difficult question comes up before a Judge at Chambers, he should not have the power to send it to the full Court. If he has no such power it is obvious that much inconvenience will result. That, however, is not for us, but for the Legislature.

SMITH, J.—The reason why I passed by that question is simply this: the question was not argued before us, not a

case having been cited in regard to it to which I could turn my attention. And another reason was that after coming to the conclusion I did, in reference to the powers of a Judge at Chambers, it was unnecessary that I should decide that question.

McDONALD, J.—I concur in the judgment given by my brother SMITH and think it was not necessary to go into the question whether a Judge at Chambers has the power to refer points raised before him to the full Court. The judgment is based on the conclusion that the Judge having no jurisdiction to deal with the question before him could not send it here, though it might be said that he could send up a question which he could legally hear at Chambers.

WEATHERBE, J.—It is not necessary to consider the question, whether a Judge at Chambers has the right to send a matter to the full Court. This was an application to a Judge, under sec. 22, of cap. 109, R. S., to obtain an order for judgment and execution to enforce an award in the case of a submission having been made a rule of Court under that section. The section is as follows:—

"Where a submission has been made a rule of the Supreme Court, the Court may enforce obedience to any award duly made under such submission by directing a judgment to be entered, or execution to issue for the amount thereof, with costs, or otherwise to carry into effect such award."

It is admitted that a single judge has no jurisdiction unless it is given by this statute. It is contended that no power is here given to a judge, and on the other hand it is argued, on the authority of *Smeeton* v. *Collier*, 1 Ex., 457, that inasmuch as where a statute in general terms, and without any special limitation either expressed or to be inferred from its terms, gives power to one of the Superior Courts that power may be exercised by a judge at Chambers, the power here given to the Court may be exercised by a judge. But in this statute there are twelve sections where power in certain cases respecting arbitration is in terms given to "the Court or a Judge." The absence in section 22 of the word "judge" is marked and significant, and this appears to be a case clearly distinguished

from the case relied upon. I think, upon a plain principle of construction, that a judge attempting to exercise the power conferred on the Court under section 22 in the same way as he would under the former sections, where the Legislature has distinctly given him the power would be "grasping a jurisdiction" which it is to be clearly seen, the Legislature never intended he should have.

GRAY *v.* THE STEEL COMPANY OF CANADA.

PLAINTIFF was employed by the Manager of the defendant company, in August, 1874, as an engineer, and on the 21st of September, 1874, the Manager wrote him that his services would not be required after the 26th of September, to which date his account was made up and paid. On October 6th, 1874, the Secretary, in London, wrote to the Manager, in Londonderry, instructing him to cancel the notice to leave above mentioned, and stating that it had been agreed that the plaintiff should receive pay from the date of his predecessor's departure at five dollars a day, "the term of his permanent service to be fixed by the Board when the salaries of other officers were discussed." This letter was shewn to the plaintiff by a clerk of the company, who gave plaintiff a copy, which was compared with the original in the presence of the Manager.

Held, that secondary evidence of this letter, on non-production of the original, was properly admitted by the Judge, and that, with a letter of similar tenor, bearing the same date, and addressed to the persons conducting the company's establishment at Londonderry, it warranted the verdict found for the plaintiff on the basis of a permanent engagement.

A rule taken "on reading the Judge's minutes" was allowed to be amended at the argument by inserting a reference to all the papers.

THIS case came before the Court on a rule *nisi* to set aside the verdict for the plaintiff. The first argument resulted in the Court being equally divided. The opinions delivered upon that argument will be found in *3 Russell & Chesley*, 25. A formal argument was then had upon the question what should be done with the verdict in view of the equal division of the Court. Judgment was delivered upon that argument by SIR WILLIAM YOUNG, C. J., reported in *3 Russell & Chesley*, 508, in pursuance of which a re-argument of the cause was ordered. The second argument of the rule *nisi* to set the verdict aside took place this term before SIR W. YOUNG, C. J., DESBARRES, MCDONALD, SMITH and WEATHERBE, JJ.

Ritchie, Q. C., opened and read the papers.

Rigby, Q. C., objected that under the rule, according to the ruling of the Court, Mr. Ritchie could not go into the argument. The rule was taken out simply "on reading the

Judge's minutes." If no papers had been mentioned the rule might have been sufficient, but the rule having mentioned one paper it should have mentioned all; *Foster* v. *Chambers*, 1 R. & C., 254, where the appeal was dismissed because the rule did not mention the affidavits used in showing cause before the Judge at Chambers.

Ritchie, Q. C.—I think this case differs from *Foster* v. *Chambers*. (WEATHERBE, J.—I think this case if possible, is stronger than that. What distinction is there?) The question arose naturally in that case, on the appeal, what papers were before the Judge at Chambers. (MCDONALD, J.—I think some reference should be made to papers intended to be read, as notice to the other party.

THE COURT allowed the rule to be amended by inserting a reference to all the papers, and the argument proceeded. As it turned wholly on the evidence it is not considered necessary to report it.

DESBARRES, J., now, (March 27th, 1880,) delivered the judgment of the Court:—

This was an action brought by the plaintiff to recover from the defendant Company a sum of money claimed to be due to him for services performed as an engineer from the 3rd August, 1874, to the 1st April, 1875. The cause was tried before Mr. Justice WILKINS, under whose instructions the jury found a verdict for the plaintiff for the full amount of his claim. A rule *nisi* was granted by the learned Judge to set the verdict aside on the following grounds; 1st. That it was against law and evidence; 2ndly. For misdirection, and 3rdly. For improper reception of evidence.

The Court on hearing the argument of the rule, being equally divided in opinion, ordered a re-argument, which was had during the present term before the full Court, by whom the case is now to be disposed of. It appears from the evidence that the plaintiff was introduced to the defendant Company about the beginning of August, 1874, by Mr. Gould, then Chief Engineer, who having been in their employ for three months was then leaving their service. On leaving the service of said defendant Company Gould recommended the plaintiff to Harrison the manager of it, as a person qualified

to discharge the duties of an engineer, and as a person whom he would find useful. Harrison, possibly acting on that recommendation, in his evidence for defendant admits that the plaintiff was then retained by him on the same terms on which he had been previously employed by Gould as an assistant for such time as he might be required. The main question involved in this case is whether the plaintiff was retained by the defendant Company as their engineer as his predecessor had been, or was employed to work for them in that capacity by the day as they might require his services. If he was retained as their engineer, and remained in their service for the full period of time allowed for by the jury, then the verdict cannot be disturbed; but if he was only occasionally employed, in other words, was not, in point of fact, actually employed during the whole of the time allowed for, then the verdict must either be set aside, or, with the consent of parties, reduced to an amount corresponding with the value of the actual services rendered. On the 21st of September, 1874, Harrison addressed a letter to the plaintiff, informing him that as the Company were reducing their staff his services would not be required after the 26th of that month, and requesting him to send in his account. The plaintiff accordingly sent in his account and was paid by the defendant Company up to that time at the rate of $5 per day. That notice of dismissal was not, however, acted upon, and the plaintiff continued in the service of defendant Company as before. If the engagement entered into by Harrison with the plaintiff was in its inception of an uncertain and indefinite character, there could, at all events, be no doubt as to what it was to be from the time of the delivery of the letter marked C of the 6th October, 1874, addressed by E. F. Tremayne, the secretary of defendant Company in London, to Harrison, the manager of it in Londonderry, conveying, as it did, positive instructions as to the nature of the employment in which plaintiff was to be engaged. This letter was shown to and read by the plaintiff in the office of the defendant Company at Londonderry, where it was handed to him by a clerk of the Company, who gave him a copy of it which was compared with the original in October, 1874, Harrison, the manager, being present at the time. This copy of the letter, on being

tendered in evidence at the trial, was objected to by defendant's counsel, but it was received by the learned Judge presiding as secondary evidence, and read on non-production of the original when demanded. It is in the following words:—

STEEL CO. OF CANADA, Limited,
London, W. S., 6th Oct., 1874.

SURVEYOR,—

We notice you have given to Mr. Gray notice to leave, but as the Board intended to retain his services, preferring him to the other gentleman, you will oblige by cancelling the notice. *It has been agreed* that he shall receive pay from the Company from the day of Mr. Gould's departure from the works at $5 per day, the term of his permanent service to be fixed by the Board when the salaries of other officers are discussed.

E. F. TREMAYNE, *Sec'y.*

This letter has a very important bearing in this cause, being, as I think, evidence of an agreement made by the defendant Company with the plaintiff to the effect therein stated, and is a complete answer to the objection urged that the plaintiff was only to be employed and paid by the day, as and when the Company required his services. Harrison, disregarding altogether the instructions given to him in the letter just referred to, says, in evidence that he never had any formal arrangement with the plaintiff except that which occurred at the conversation between Gould, plaintiff and himself. After that he says; "Whenever I required plaintiff's services I always notified him; plaintiff was subject to my directions and orders." He wishes it to be understood that the plaintiff engaged to work for the defendant Company by the day in case they should have occasion to employ him, and hold himself ready to obey his orders, as manager of said Company, when called upon. Can it be supposed that any man educated and trained as an engineer, and qualified to discharge the duties of that avocation, and competent to supply the place of a man who for three months was paid $40 per day by this same Company for the like services that the plaintiff, when called upon, would have to perform, could ever have made an agreement of so uncertain

and disadvantageous a character as that which Harrison has described? I confess I find it difficult to believe that any intelligent man would do so.

But there is another letter addressed by Tremayne as Secretary of defendant Company to those conducting their works in Nova Scotia, also dated Oct. 6th, 1874 and marked D., that was also put in evidence, which to my mind removes every doubt as to the nature of the contract made by the defendant Company with the plaintiff, showing conclusively that it was of a very different character from that spoken of by Mr. Harrison. By this letter the persons conducting the establishment of the defendant Company at Londonderry were requested to accept the services of Mr. Gray, to remunerate him for all the work done subsequent to Mr. Gould's departure, to continue to afford him field assistance, and to inform him, that the consideration of his permanent employment would be entered into at an early date, adding that certain instructions accompanying this letter were to be communicated to Mr. Gray without delay. Harrison says, that there was no written agreement for the hiring of plaintiff made. He was, as he says, employed from day to day at $3 per day for the days he was employed. It is true there was no written agreement actually signed by the parties, but there was a correspondence constituting an agreement which he has thought fit to ignore and entirely to disregard. The objection taken by defendant's Counsel to the admissibility of the letter marked C, on the ground of its having been exhibited to and read by plaintiff without Harrison's consent, cannot, I think, be held to be a good objection. It was not a letter intended to be read by Harrison and by him only. It was a business letter containing instructions in reference to the employment of the plaintiff which Harrison, as the servant of the defendant Company, was bound to carry out. Instead of concealing it as he evidently intended to do from the plaintiff, it was his duty to communicate its contents to the plaintiff, who, from the interest he had in the subject-matter to which it referred, was entitled to see and read it as well as himself. I therefore think that the learned Judge was right in receiving the copy of the letter as secondary evidence under the circumstances of this case, and that its reception can in no way affect the

verdict. After the best consideration, I have been enabled to give to this case, I have arrived at the conclusion that the verdict found for the plaintiff ought to be sustained and that the rule *nisi* for setting it aside ought to be discharged with costs.

MERCHANTS' BANK *v.* STIRLING.

DEFENDANT, a Nova Scotian, resident in Paris, gave an accommodation note bearing date "Halifax, N. S., 6th, 1875," payable to M. on demand, and enclosed it to him on the 11th June. The 6th of June being Sunday, M. on receipt of the note altered the 6 to 8, and inserted at the the top the word *June*, which had been omitted.

Held that, as the liability of the maker was not increased, the note being payable on demand, and the alteration was made to correct a manifest mistake on the part of the maker, the note was good.

The note, with others, was given to M. to assist him in his business in Halifax, and was endorsed by him in blank and given to the plaintiffs, not for discount, but to be held by them as security for advances. Accounts were put in showing advances amounting to $95,000, and resulting in a balance of $13,000 due by M. to the plaintiffs. The notes were not mentioned in the accounts at all.

Held, that the equitable doctrine as to priority of payments did not apply so as to discharge the notes as older obligations.

Defendant pleaded defective stamping and cancellation, to which plaintiffs did not reply, and on the trial the Cashier of the plaintiff Bank double-stamped the note and, in his evidence, stated that he had just then become aware of the defect of stamps.

Held, that the Cashier was the person whose knowledge was to be tested to determine the right to double-stamp, and that, (although *per* YOUNG, C. J., the more prudent course was to reply the double-stamping,) the want of a replication was not sufficient ground for a new trial.

Held, that the notes being dated at Halifax and meant to be used there,—being given by one British subject to another, and having no relation to foreign transactions, the French law could not be invoked to determine the liability of the maker.

THIS was an action brought to recover the amount of three promissory notes, the first and second for $5000 each, and the third for $8000, made in Paris by the defendant, a Nova Scotian resident in that city, but bearing date Halifax, N. S., and payable to E. Morrison, to whom they were given to assist him in carrying on his business in Halifax. The notes were endorsed in blank by Morrison and handed to the Merchants' Bank, the plaintiffs, not for discount, but to be held by them as security. The cause was tried before Mr. Justice SMITH, without a jury, who gave judgment for the defendant on the first note on the ground of a material alteration in the note. Judgment was for the plaintiffs on the second and third notes,

and a rule to set the judgment aside was taken on the grounds chiefly of material alterations in the notes, defective stamping and cancellation, and that, the notes being made in Paris, plaintiffs' right to recover must be governed by the French law, as to which an expert was called, who said that the plaintiffs could not recover under the circumstances. The rule to set aside the finding of the learned Judge and for a new trial was argued this Term before SIR WILLIAM YOUNG, C. J., MCDONALD, JAMES and WEATHERBE, J J.

Meagher, in support of rule.—There was a material alteration in the third note in regard to the month and date of making. Evidence of double stamping could only be given under a replication. The note was not sufficiently stamped. This applies to all the notes; Acts of 1874, chapter 47, section 12. To entitle to double stamp it must be shewn that the insufficiency was not known before. Morrison says he stamped the notes by putting Stirling's initials. He could not do that. If he did so he would have to double stamp and the date would be different from that of the note. Morrison should have double stamped, putting his own name on and the date at which he did it. We also take the ground that the defendant has the same defences open to him as if Morrison had sued him. The verdict is against evidence, as Morrison is uncontradicted as to stamps.

Attorney-General, contra.—The contention with regard to the alteration of the third note is that the date "6th" was an alteration, and "June" interlined. The evidence of that is not conclusive, and we have the verdict negativing it. The insertion of the word "June" was not a material alteration but the supplying of an omission. See *Chitty & Hulme* on *Bills of Exchange*, 184; *11 Gray*, 390; *Clark on Bills & Notes*, 161; *Id.*, 61. The date filled in here is that on which the note was put in circulation. There is one plea covering the charge of alteration from the "6th" to the "8th." The stamp on the third note did not require to be dated as of the time when the note was signed. Dom. Acts of 1879, chapter 17, section 15, covers the case exactly. See also Dom. Acts of 1878, chapter 10, sections 1 and 8, making the act retrospective. The first section of the Act of 1879 makes it a consolidation

and continuation of the previous Stamp Acts. With reference to the second note, the only alteration complained of is the insertion of the words, "at the Merchants' Bank of Halifax." This alteration is not pleaded. The evidence of it by Stirling is unsatisfactory. Morrison, in whose handwriting the note was, does not speak of it. The appearance of the original note itself negatives it. Cites *Clark on Bills & Notes*, 160. As to the stamp on the second note, the evidence was at least amply sufficient to sustain the verdict. There was no contradiction of McLean's evidence as to his previous want of knowledge of insufficient cancellation. McLean was the Cashier, and the corporation could only be charged with the knowledge possessed by him, its principal executive officer. The alterations should have been pleaded specially. Our statute differs from the law in England. Cites Revised Statutes, chapter 94, sections 135, 136. The question is discussed in *25 U. C. Q. B.*, 243, where the practice is not so rigid as our own, but is more like the English. In England the party can avail himself of the alteration without plea, but that is exactly the point on which our statute makes the difference; *13 M. & W.*, 778; *5 U. C. Q. B.*, 218. The alterations were all admittedly made before the notes were issued, except in the case of the first note, which has been discarded. They were accommodation notes between the maker and the payee, and were not issued until they were handed in by Morrison to the bank. Alterations made in a note before it is issued do not vitiate it; *Byles* on *Bills*, 486. In regard to French law, the expert gave very interesting testimony until this case was put to him, when he said it would not apply. *2 Russell*, 351, 352, as to applicability of the foreign law; *1 Bing. N. C.*, 151; *L. R., 3 Q. B.*, 77; *L. R., 5 C. P.*, 473. The last case limits the application of the principles stated in the case in *Bingham*. It would be inconsistent with the statute to lay down the principle that double stamping must be replied. It can be done according to the act at any time during the trial. (WEATHERBE, J.—It would seem to be necessary except where it is done at the trial. Suppose it were done before the trial?) I think the act would cure even that. The notes were given to Morrison to use in his business in any way he liked, and he used them in this way.

(JAMES, J.—It appears to me they were in the nature of collateral security.) Exactly.

Rigby, Q. C., in reply.—The question when the notes were issued affects two branches of the argument. It they were not notes until handed to the bank, then they were issued in Nova Scotia, and the act cited in reference to stamping foreign notes does not apply; Acts of 1878, chapter 10, section 1. (MCDONALD, J.—The act refers to the drawing, not the issuing.) They are identical. (MCDONALD, J.—I don't think so.) It is immaterial to me where they were issued. Under the law cited from *Chitty* it is not a note until it is in the hands of a holder for value. I hold it, then, for the purpose of argument, to be a Canadian contract. The date on the second note was not the date of the cancellation, but the apparent date, which was a month anterior. The doctrine in *Byles* on *Bills*, that a note may be altered before the issue, is qualified so as to require the consent of the parties; *5 B. & A.*, 675. *2 Smith's L. C.*, part 2, 1254, shews the same qualification. As to replication, the Dominion Parliament cannot affect the procedure of our Courts. But admitting they have the power, it was not too late on the trial to stamp, and then get permission of the Court on affidavit to reply. It should appear on affidavit.

Assuming that the question of stamping could have been entertained by the Court, the Merchants' Bank must shew that when they became holders they had no knowledge, and that as soon as they obtained such knowledge they double stamped; Acts of 1879, chapter 17, section 13. The burden of shewing this was on the bank. The business was under the management of a President and Directors; Acts of 1879, chapter 59, sections 8, 26. The President was not asked about his knowledge. Every note goes before the President and certain of the Directors. Because the Manager had no notice, can it be inferred that the Directors had none? All the Directors who were at the meeting when the note was presented should have been called. *In re Carew's Estate*, 31 Beav., 39. The validity of the act was questioned when the plea was put in. An alteration of the date of a note is material. *Smith's L. C.*, 1275, 1279, as to question being raised by the pleadings. Where an alteration is material, degrees of materiality cannot

be considered. The alteration made a difference in the Statute of Limitations. In regard to the French law the Advocate only qualified his opinion when a case was put to him of notes made here. If they were notes when Stirling mailed them, the Advocate was positive as to what the French law would be; *L. R., 3 Q. B.*, 77; *L. R., 5 C. P.*, 473; *L. R., 3 C. P.*, 538. There was a general account and also a special account on these notes. The money having been advanced on account of these notes, as soon as it came in, it should have been credited. It cannot be inferred that the notes were to be allowed to remain there indefinitely. (WEATHERBE, J.—It is a question of fact to be determined by the evidence. YOUNG, C. J.—You contend that they were only intended to secure one single advance, and not to be a continuing security.) Cites *Clayton's Case*, 1 Mer., 584, on the point of appropriation.

SIR WILLIAM YOUNG, C. J., now, (March 27th, 1880,) delivered the judgment of the Court:—

In this case the defendant, a Nova Scotian, resident in Paris, is sued by the plaintiffs as the holders of three promissory notes, distinguished in the evidence as Nos. 1 & 2, each for $5000, and No. 3 for $8000, signed by the defendant at Paris, but dated Halifax, N. S., and payable to E. Morrison & Co., on demand. Morrison applied for and got the notes to assist him in carrying on his business at Halifax and indorsed them in blank, not for discount but to be held by the Bank as a security for advances. The defendant received no consideration for them and states in his evidence that he signed and gave them to Morrison to help him in his business and thought they were to be used by him for that purpose. Morrison did not hesitate to avail himself of this confidence, and, having obtained from the defendant Nos. 1 & 2 in the years 1873 and 1874, asked him by letter of 6th May, 1875, to sign No. 3 which he enclosed to enable him to do as before, and the defendant signed and returned it to him on the 11th of June. Morrison having become bankrupt, the present action was brought 15th March, 1879, and fourteen pleas were put in.

On the trial it was proved that the first note, after it was signed and returned here, was altered by inserting the words "payable at Merchants Bank of Halifax" which Judge SMITH,

who tried the cause without a jury, held to be a material alteration, and as to that note he gave a verdict for the defendant in which the plaintiffs have acquiesced.

Alterations also were alleged in Nos. 2 and 3, and these I shall first of all consider. No. 2 like No. 1 is in the handwriting of Morrison, and in the body of it, and not by way of addition as in No. 1, the defendant promises to pay the amount "at the Merchants Bank of Halifax." The word "payable" is not in it, but Stirling, looking at the exhibits purporting to be copies of the three notes, says, that he sees on the two first the words "payable at the Merchants Bank of Halifax," which must have been added afterwards, for, he adds, "I know of a certainty they were not written upon them when I signed and issued the said notes." The Judge, however, found that the defendant was mistaken in this, and it is impossible, I think, to inspect No. 2 without being convinced that no alteration in point of fact was made in it.

The note No. 3 was applied for on the 6th of May, and when it was signed stood thus; "Halifax, N. S., 6th, 1875," there being no month nor room for a month. It was enclosed to Morrison on the 11th of June, and probably reached him in that month. Now the 6th of June, 1875 was on Sunday and Morrison altered the 6th into 8th and inserted "June," at the top above the year, and the question is was this a material alteration. I have looked at all the cases cited and many others, and find no case exactly resembling this, where a blank was filled up and a month, that is a date, added without authority of the maker or acceptor. Mr. Morrison says; "The third note was written on eighth of May, 1875, and sent to Mr. Stirling in France," which he did in his letter of 6th May and got it back in June,—he thinks about the 8th,—but there he is mistaken. So also is the defendant when he says; "As to the third note, of which I have kept a copy I made at the time, I see it was dated, the 6th May, 1875." Independently, however, of these misapprehensions, there is the admitted fact, not of a blank purposely left, to be filled up, but of a material part of the date omitted and supplied by the payee. The cases up to 1848 are reviewed in *Mouditt* v. *Culyer*, 5 U. C. Q. B., 218, and *Parry* v. *Nicholson*, 13 M. & W., 778,

is there said to have been hastily decided. In *Hirchman* v. *Budd*, 28 L. T., N. S., 602, decided in 1873, *Parry* v. *Nicholson* is doubted and overruled, and *Cook* v. *Coxwell*, 2 C. M. & R., 291, approved. The date of a bill, therefore, is no longer held to be immaterial, and it is difficult to understand how it could have been so considered. But a mistake or omission stands upon a different footing, and a bill may be altered to correct a mistake, and in furtherance of the original intention of the parties; *Downes* v. *Richardson*, 5 B. & Ald., 674; *Byles* on *Bills*, 312. In *Hirschman* v. *Budd* the bill was payable four months after date, and the alteration of the date from the 1st to the 11th of October was held fatal, as it affected the liability of the acceptor. Here the note is payable on demand, and the liability of the maker is not increased, and for this reason, as well as for the correction of a mistake, I think the note is good. See also *Ames* v. *Colburn*, 11 Gray., 390; *Trapp* v. *Spearman*, 3 Esp., 57. The next defence was urged but slightly at the argument and requires only a passing observation. It is expanded in the 12th, 13th and 14th pleas, and amounts to this, that the defendant, residing in France, and having signed the notes there, they are to be taken as French contracts, and the law of France, as testified to by an expert, would discharge him. But these notes were dated at Halifax, and meant to be used there, given by one British subject to another, and having no relation to foreign transactions, and under these circumstances the expert could not say that the French law affecting the indorser and holder of an accommodation note would apply. There are pleas also of payment founded on the special accounts kept between the bank and Morrison. These are in evidence, and cover large sums amounting from September, 1873, to December, 1875, to $95,000 advances, and resulting in a balance of $18,422 due by Morrison. The three notes of the defendant are not mentioned at all, and were held by the bank as securities available in case of loss. In this light they obtained a credit for Morrison, and effectually helped him in his business, that being the aim and purpose of the defendant without inquiring how they were to effect it. And to such a transaction we think the equitable doctrines as to priority of payment and the discharge of elder obligations do not apply.

The case, therefore, in my opinion, turns altogether upon the second plea, which runs thus; "And for a second plea to said declaration defendant says that said notes were not, nor was any of them legally or properly stamped as by law required nor were stamps thereto of the proper amount affixed, nor were the same stamped by the party or parties, nor at the proper time nor times, nor were the stamps thereon legally or properly defaced, or at the proper time or times, or by the proper party or parties."

To this there was no replication, and the evidence was as follows:—

Morrison says; "The stamping and cancellation of note 3 was done the same day I received it. Mr. McLean, the Cashier, sent out for the stamps to put on No. 1, and I put them on in his presence, in his office. The three notes were indorsed by me in the bank at the same time the stamps were put on. I put the initials on the stamp of note No. 2 without defendant's knowledge. I did not understand how the stamps were to be effaced, and thought it legal to use the defendant's name." George McLean, the Cashier of the Bank, was then called, and said; "These stamps on the back of the notes were put on just now. I just this moment became aware of the defect of stamps." This evidence was objected to as contradicting Morrison, and because the defendant had notice by the plea of imperfection of stamps, and it was now too late to double stamp. The notes were then put in, subject to objection, and read. The action having been brought before the passage of the Dominion Consolidating Stamp Act of 1879, we must look to the Act of 1874, chapter 47, the 12th section of which is substantially the same with the 13th section of the Act of 1879. Two points were insisted on at the argument besides the two above stated taken at the trial; first, that the Cashier of the Bank was not the holder, and neither the President nor Directors of the Bank were produced to testify their want of knowledge of the defects; secondly, the want of a replication. To both objections it may be justly said that if taken at the trial they might have been remedied by calling the President and asking leave to reply. No cases or authorities were cited at the argument upon either point, and few are to be found.

The Cashiers of our Banks, as we all know, are in fact the Managers, and if we look at our judgment in 1873, in the *Bank of Nova Scotia* v. *Forman et. al.*, we shall find that they have rather too much than too little authority. The American cases on this point are collected in *Angel & Ames on Corporations*, first Edition 173, where it is said, after stating his various powers: "In short the Cashier is considered the executive officer through whom and by whom the whole monied operations of the Bank in paying or receiving debts or discharging or transferring securities are to be conducted. *Virtute officii* he is generally entrusted with the notes, securities and other funds of the Bank, and is held out to the world by the Bank as its general agent in the negotiation, management and disposal of them." The Cashier, therefore, it appears to me, and not the President, was the officer whose knowledge was to be tested. The Cashier is first mentioned in the Dominion Banking Act of 1871, sec. 60,

The point of pleading is attended with some difficulty. *Bullen & Leake*, 3rd. Edit. in 1868, give no form of plea for defect of stamps, and they intimate in their notes 467, 522, that objections made under the Stamp Laws are to be taken on the evidence. It was urged here that the objection must be pleaded under sec. 236 of chapter 94, but that section is an exact transcript of the English rules of 1853, sec. 8. The two consolidating Imperial Acts for the imposition and management of stamp duties, 33 & 34, Vic. Chap 97 and 98, say nothing on this point nor on the subject of double duties, and only two cases are to be found in the reports since 1870. In *Viale* v. *Michael*, 30 L. T., N. S., 463, the defendant in his pleas raised no question as to the stamps which he objected to at the trial, and QUAIN, J. allowed the plaintiff to obliterate the stamp then and there in Court, and BLACKBURN, J. observed that the objection that the bills were not properly cancelled would have required a special plea to that effect. This was in 1874, and in the same year *Marc* v. *Rouy*, is reported in 31 L. T., N. S., 372. An objection was raised to the stamp at the trial, and BLACKBURN, J. repeated that in his own opinion it ought to have been pleaded, in which LUSH, J. was disposed to concur, but MELLOR, J. observed that it was

not necessary to decide the point in the case before them. I find no case subsequent to these in *Fisher's Digest* up to 1878. In Ontario it would seem from *Clark on Bills*, 199 to 205, that the objections under the stamp laws, previous to and since Confederation, were usually pleaded, and replication put in and sometimes demurred to. But these decisions do not bind us and may be founded on some rule of their own. It is the more prudent course, I think, to plead the defects and to reply the double stamping that the true issue may be raised. But in the absence of any decision of this Court and of an objection at the trial, the want of a replication is not a sufficient ground for a new trial, and the rule *nisi* must be discharged with costs.

WEATHERBE, J.—I have no doubt that the law of France is not applicable.

The questions respecting the alterations depend on conflicting statements in the evidence and the examination of the face of the notes, and are set at rest by the verdict.

I think, from all that appears, that there was sufficient to satisfy the learned judge who tried the cause that the defect in the stamping became disclosed at the trial. I concur in the conclusion arrived at by the rest of the judges.

IN RE PICTOU RAILWAY DAMAGES.

COUNTY of Pictou held to be estopped by chapters 66 and 70, of the Acts of 1879, passed after hearing the Custos of the County by Counsel before a committee of the Legislature, from disputing the appraisement of lands taken for Eastern Extension.

IN this cause *Rigby, Q. C.*, moved, (February 22nd, 1879,) before the full Court, to discharge a rule *nisi* previously obtained by him on behalf of the County of Pictou to set aside the appraisement of railway damages for the Halifax and Cape Breton Railway, in order to obtain a new rule based on the ground that the Halifax and Cape Breton Coal and Railway Company, which had undertaken to build the road, had no legal existence.

SIR WILLIAM YOUNG, C. J., (March 1st, 1879) delivered the judgment of the Court, orally, granting the rule *nisi* :—

The Act of 1874 incorporated a company to build the road from New Glasgow eastward, and the act contained two general clauses, the one declaring that a certain amount should be subscribed and paid in before the company went into operation, and the other that the act should expire if not acted upon in two years, which period had in point of fact expired before the order for appraisement in April, 1877. Under this order an appraisement was directed, and was actually made all over the County of Pictou, from which there was a number of appeals taken. In 1878 a rule *nisi* was taken to set the whole proceedings aside. This rule has never been argued, and Mr. Rigby obtained an order to set it aside in order to make way for a rule for which he now asks to set aside the whole proceedings on the ground that the act of 1874 had ceased to be operative, and on the ground that a certificate of a most anomalous character and such as I never heard of before, is not binding. If this is made absolute it strikes at the root of the whole proceedings since 1877, including the appraisement, and must lead to trespass suits without number, but, as the previous rule has been set aside at the instance of the mover and by consent, we cannot refuse Mr. Rigby his rule *nisi*, which we grant however, with the full expectation that the matter will be set right by legislation at the coming Session of Parliament.

This rule came on for argument during the present Term, but in the meantime remedial legislation had been adopted by chapters 66 and 70 of 1879. *q. v.*

SIR WILLIAM YOUNG, C. J., now (March 27th, 1880,) delivered the judgment of the Court:—

This case came before us for argument in the present term on the *rule nisi* granted on the 1st of March, 1879, attacking the organization and the existence of the Halifax and Cape Breton Railway and Coal Company, and all the proceedings for the dedication and appraisement of the lands taken for the railway now open, and being worked in the County of Pictou, as illegal and void. What our decision might have been on the

facts and allegations on which the rule *nisi* was founded, we need not inquire, for our attention was immediately turned to the the remedial legislation of the last session in the chapters 66 and 70, passed 17th April, 1879, in view of the rule and proceedings then pending. It appeared also, by the affidavits of Mr. Abbott, of 17th December, and of Mr. D. C. Fraser, of 2nd January, last, that by an agreement entered into at Ottawa, on the 1st of February, 1879, large concessions had been made by the Company, and, in consequence thereof, such remedial legislation had been obtained removing doubts about the incorporation of the Company; that the Custos of the County was heard by Counsel before a Committee of the Legislature on behalf of the County, and that on their behalf sections 8 and 9 of chapter 70 were added thereto. It further appeared that the Custos of the County had issued and delivered to the persons to whom damages had been awarded for their lands appropriated to the railway, certificates or debentures for the amounts of the appraisements, which had been endorsed to and were held by various persons other than the original payees. The form of these certificates is given by Mr. Fraser, pursuant to schedule C of the Railway Act, under the hands of the Custos and Clerk of the Peace of the County, payable to order, and transferrable by endorsement under section 54, and such indorsement had been to a large extent made. On these facts, which were admitted at the argument, it was obvious that it could not proceed till the parties so interested were called in, but it moreover appeared to us, and we so decided, that the County was estopped by the action of the Custos and of the Legislature, and could no longer dispute the validity of the appraisement which in some instances had been lowered by arrangements made with their owners in the interest of the County. The rule *nisi*, therefore of 1st March, 1879, is discharged, and we are open to any application under said rule or the Act of 1879 in respect to costs.

JOST *v.* CHURCH-WARDENS AND VESTRY OF ST. GEORGE'S.

PLAINTIFF brought an action for use and occupation, which was afterwards amended by adding a count for mesne profits. Defendants pleaded disputing plaintiff's title and possession, and plaintiff, besides joining issue, replied setting out the fact of an ejectment suit against one Davis, the ord r of a Judge permitting defendants to appear *as landlords* and defend said ejectment suit, the proceedings in said suit on the *6th May, '75, before McDonald, J.*, when came the said *William Jost and the said Church-ward-ns and Vestry*, and a jury who found, &c. On the trial the verdict in an ejectment suit was tendered and received without objection. It was signed by the Foreman and Prothonotary, and purported to be between Jost, as plaintiff, and Davis as Defendant, and did not mention the present defendants at all. A record signed by the attorney and not authenticated by an officer of the Court, was then tendered, which recited an ejectment suit between Jost and Davis, the order of a Judge allowing the present defendants to appear and defend *in their own name*, the proceedings on *April 27th, '75*, when, "*before Sir W. Young, C. J.*, and his associate Justices, came *the parties within mentioned*," (being the plaintiff, Davis, and the Church-wardens,) "and a jury, sworn," &c. The record was rejected and the plaintiff non-suited.

Held, that the record should have been received.

WEATHERBE, J., dissenting.

THE plaintiff brought an action of ejectment against one Davis, and afterwards an order was obtained permitting the Church-wardens and Vestry of St. George's parish to defend the action in their own name. This action was brought on for trial before Mr. Justice MCDONALD, and a verdict found for the plaintiff which was confirmed by the Court after argument. The present action was then brought for mesne profits, the plaintiff only claiming the proceeds subsequent to the alleged date of the demise. In proof of his case the plaintiff offered in evidence the record in the previous suit, to which objection was taken that the record was signed only by the attorney, and not authenticated by an officer of the Court. It was also objected that whereas the plaintiff in his replication to defendant's pleas had stated that the trial of the ejectment suit was before Mr. Justice MCDONALD, the record set out that the matter came before the Court and a Jury appointed to try, etc. The plaintiff's counsel in the course of the trial produced the papers in the ejectment suit, including the verdict, which was entitled by the officer of the Court "William Jost *v.* James Davis." On these grounds the record was rejected by Mr. Justice WEATHERBE, who tried the cause, and the plaintiff was non-suited. A rule was taken to set the non-suit aside and for a new trial, which was argued this term.

Rigby, Q. C., asked to add as an additional ground to set the non-suit aside that the non-suit was against law.

WEATHERBE, J., said there would be no limit to amendments if one like this were permitted.

YOUNG, C. J.—You had better go on with your argument.

DesBarres, for rule.—Jost sued Davis in ejectment. The Church-wardens took out a rule permitting them to come in and defend in their own name, and a verdict was rendered for plaintiff. Jost in the present action sues for mesne profits, and to the defendant's pleas rejoins the verdict in the previous suit, as appears by the record in the suit. On the trial it appeared by the record as if the verdict was rendered against Davis, and not against the Church-wardens. The plaintiff was non-suited. My point is that a record imports absolute verity; *Co. Litt.*, 268 *a*; *3 Bl. Com.*, 24; *Lynn* v. *Thorpe*, 1 B. & Ald., 153, 156; *Rex* v. *Carlisle*, 2 B. & A., 367; *Read* v. *Jackson*, 1 East., 355; *Rogers* v. *Hadley*, 2 H. & C., 245; *Wildes* v. *Russell*, L. R., 1 C. P., 741; *Chesley* v. *Bonnett*, 1 R. & C., 112; *7 Cush.*, 284; *Bigelow on Estoppel*, p. 1.

Having proved our right to the land, and there being no plea of no recovery in ejectment, it was not necessary for us to plead the record at all. We bring an action to recover mesne profits, and to succeed there must have been a recovery in ejectment. I think an action on a promissory note against an indorser is an analogous case to show that it was not necessary that the recovery in ejectment should appear on the declaration. In the case put it is not necessary to allege notice of dishonour.

Ritchie, Q. C., contra.—There is no allegation of recovery in ejectment. By the pleadings the plaintiff is put to the proof of his title, in which he has failed. Under the deed produced there is no title in any one. All the parties are dead, and no new trustees appointed. If plaintiff has any right at all he is a joint tenant. By the deed Jost had the dues to pay, and if he neglected to do so his rights would be reduced to nothing. No one ever understood that there was to be any substitution. The rule for a new trial is headed against Davis and the Church-wardens. That rule is still outstanding and undischarged. After putting in evidence of the verdict can the plaintiffs put in evidence to contradict it?

(YOUNG, C. J.—There is no doubt that there is a blunder, and the question is what is the effect of it.) This record is made up by an attorney, and is not authenticated by any officer of the Court. There is no law or practice to make a record good that is so made up. (YOUNG, C. J.—I think there is abundant law for it. WEATHERBE, J.—There is no English law; the point has not been raised before.) The record is not good because it does not dispose of all the parties. It should show how Davis is disposed of. The record put in is at variance with the record pleaded.

This is a distinct action, and it is contended that because one tenant paid rent we are estopped; I cannot admit that. Mr. DesBarres moved to amend by altering the name of the corporation. The minute this was done the record was not between the same parties, and he should have proved that the corporations were the same. *Nash* v. *Swinburne*, 4 Scott, N. R., 563.

Rigby, Q. C., in reply.—The only question before the Court is whether the record ought to have been admitted. Whether admissible under the plea or not we were entitled to put it in to show a recovery in ejectment. By excluding the record the Judge deprived us of our right to recover under the common counts, as there would have been evidence enough *prima facie* to entitle us to do, because the evidence would show that the title was in us and we were entitled to the money. All that is necessary is to prove that money was received, and received to our use. The evidence is conclusive on this point. Under the common counts, and the pleas to them, we were entitled to have the record in evidence. (WEATHERBE, J.—I rejected the record pleaded. Now you contend you are entitled to get in a record that you did not plead. YOUNG, C. J.—It is the same record in different aspects. WEATHERBE, J.—It is splitting hairs.) We have to do so. It is splitting hairs all around. (WEATHERBE, J.—If you succeed in this way it will be a marvel.) Cites *Bullen & Leake*, 44.

The record offered was not at variance from that pleaded. The attorney who drew up the record followed the English practice where the assizes for the trial of causes are considered as one day. The record gives the first day of the assizes. We pleaded that the cause was tried before Mr. Justice

McDONALD, but in theory it was tried on the first day, as is stated in the record. (WEATHERBE, J.—I don't know where you would stop if this is precision. I don't know a worse case of variance.) *Whittaker* v. *Wise*, 12 C. B. 44, *per* MAULE, J. (WEATHERBE, J.—*Taylor*, 1559, is worthy of attention. The English Courts will refuse to disturb a verdict unless the evidence was tendered at the trial and the grounds noted, and that on those grounds it should be received. YOUNG, C. J.—That is a new principle. It has never been the practice here. WEATHERBE, J.—If we do admit it, another Court following the English law will set our decision aside. YOUNG, C. J. —We will follow our own practice. If another Court sets it aside that is another matter.)

It was contended that there should have been evidence that the corporations were the same. After the change of name by chapter 24, Acts 1876, the Court would take notice of it without evidence being given. The act referred to was in amendment of chapter 25, *R. S.*, p. 139, from which the first name of the corporation was derived. The law speaks for itself. The Court takes judicial notice of it. As to the record,—whether it is really a record, I think the case already cited from *1, Russell & Chesley*, 112, is very strong. (WEATHERBE, J.—If the statute requires us to follow a certain practice, what right have we to establish another?) The act is qualified. It says we are to follow the English practice in cases not otherwise provided for, and then says we are to follow it as nearly as may be. I think it may be otherwise provided by a practice extending over fifty years. (WEATHERBE, J.—I think it means "herein otherwise provided.")

As to Mr. Ritchie's point that a record cannot be put in where there is previous contradictory evidence, the highest evidence should prevail, but I do not think there is any contradiction. The verdict is not in the same suit in which the record is put in.

SIR WILLIAM YOUNG, C. J., now, (March 27th, 1880,) delivered the judgment of the Court:

This case was perplexed on the trial and argument with a large body of extraneous matter, though originally of the

simplest form. The plaintiff, through his agent, having let James Davis into possession of a lot of land and house in Maitland Street, bought in 1830 for the choir of St. George's parish, and Davis having paid rent therefor to the agent, Jost brought an action against him of ejectment, and on an affidavit of his attorney he obtained a Judge's order that the Church-wardens and Vestry of St. George's parish be permitted to appear and defend the action in their own name. It was brought on for trial before Mr. Justice McDONALD, and a verdict found for the plaintiff, which was confirmed by the Court after argument, but the title of Jost did not come into question at all; he recovered upon the ground that Davis was his tenant and could not dispute his title. He took possession under his judgment against the Church-wardens, and in August, 1876, brought the present action against them for mesne profits.

At first he framed his writ for use and occupation, with the common counts, upon which, as I think, he could not possibly have succeeded. He then amended his writ by adding a count for mesne profits in the form, *totidem verbis*, in *Bullen & Leake*, 421, which does not aver a recovery in ejectment, but refers only to the expenses incurred in bringing the action to recover possession. The defendants put in four pleas to the added count, disputing the plaintiff's title and possession, in which the plaintiff joined issue, and there, I think, he should have stopped, and relied upon his record, by which the defendants were concluded if regular.

In *Greenleaf on Evidence*, section 333, the rule is explicitly stated, that where the action for mesne profits is between the parties to the prior action of ejectment, and the plaintiff proceeds only for profits subsequent to the alleged date of the demise, (which was the case here,) the record of the judgment in that case will be conclusive evidence of the plaintiff's title and of the defendant's entry and possession from the day of the demise laid in the declaration. So in *Adams on Ejectment*, 1st Am. ed., 334, the rule is declared to be now settled that after every recovery in ejectment the tenant is estopped from controverting the title of the plaintiff in a subsequent action for mesne profits, provided the plaintiffs proceed only for the profits accruing subsequently to the time

of the ouster in the ejectment; and a number of American cases are cited, some of them of an extreme character, affirming this doctrine. It applies, of course, to a third party intervening and claiming to be a landlord, as in this case, and in our *Revised Statutes, Forms*, fol. 513; *Archbold's Practice*, 1032-7; 4 *Evans' Statutes*, 174; *3 Burr.*, 1304, where Mr. Justice WILMOT refers to the *11 George II.*, chap. 19, admitting a landlord to defend in the stead of a tenant in possession. It seems, says *Archbold* quoting the last case, that landlord and tenant may jointly defend the action; but that was neither asked for nor conceded in the present case. The defendants put in the pleas to the added count in their own names, and Davis's pleas to the former counts in assumpsit were superseded.

Up to this point there is no difficulty in the case, if the record produced at the trial be regular. It was prepared by the plaintiff's attorney, and filed July 21st, 1876. It sets out the writ in ejectment against Davis and the usual plea by him, the subsequent order of a Judge, permitting the defendants to appear and defend, their plea as landlord in the usual form, and a judgment of the Court in favor of the plaintiff after the verdict of a jury. On the face of it this record is unexceptionable, and I heard it urged, for the first time in this Court, at the argument, that the record was invalid because signed by the attorney only, and not authenticated by an officer of the Court. I should have thought that our immemorial usage, whereof the memory of man runneth not to the contrary, besides the assent of the Legislature to be implied from the fee table, was enough; for what would become of thousands of titles resting on records such as this, if it were not good? I am pleased, therefore, to find, independently of our practice, that the attorneys in the Queen's Bench prepare the records at *nisi prius*, just as ours prepare the issues, and the records or rolls attesting the judgments on the same principle. See *Archbold*, 361, and *Tidd*, 730, who says that the entries on the rolls were formerly made in the King's Bench by the clerks of the chief clerk, as in the Common Pleas they were made by the clerks of the prothonotaries who were called entering clerks; but they are now made in both courts by the attorneys. Much was said at the argument, and several

cases were cited, but I content myself with an extract from the old edition of *Blackstone*, 3 Com., 24; "It is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself, that is, upon bare inspection, whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk," (and now of the attorney,) "in making up such record, the Court will direct him to amend it," for which a Judge's order may be obtained; *Archbold*, 361; *1 M. & W.*, 432. If there was any mistake in this record, which was the sole foundation of this suit, and was filed more than two years before the trial, why was it not attacked on motion, that an amendment, if necessary, might be made.

But the difficulty at the trial did not arise out of the record, but out of the pleading and extraneous evidence. The plaintiff, besides joining issue on the defendant's pleas, put in a replication alleging some things which raised a question of variance. It stated that the trial of the ejectment was before Mr. Justice McDONALD, while the record merely stated that the action came before the Court and a Jury, "sworn to try the matter in question between the said parties who say upon their oath that the plaintiff is entitled to the possession of the land as in the writ alleged," which appears to me abundantly sufficient.

Then upon the trial the plaintiff's counsel inadvertently produced the papers in the ejectment suit, including the verdict, which was entitled by the officer, "William Jost *v.* James Davis" in place of "James Davis *et al.*," or the defendants, and this mistake was urged as a fatal contradiction of the record. But besides the obvious injustice of the plaintiff's action being defeated by a slip or error not his own nor his attorney's, the principle protects him that a record cannot be contradicted by matter *dehors*, but, unless amended, is conclusive. As Lord COKE says, *1 Inst.*, 260, it can be tried only by itself. "The rolls import in them such incontrollable credit and verity, as they admit of no averment, plea or proof to the contrary."

I abstain from saying anything of the deed of 1830, because in my view the plaintiff's title does not come into question. If he have no title, he has possession and an equitable claim, but above all he has a judgment in ejectment.

I need say nothing either of the amendment at the trial, substituting the title of the defendants under the Church Act of 1876 for the title previous thereto under the old act; an ecclesiastical change of this kind cannot surely affect the plaintiff's right, and if the amendment will not aid, at least it should not hurt him.

On these grounds I am of opinion that the record, having been rejected at the trial, should have been received, and that the rule for a new trial should be made absolute with costs.

WEATHERBE, J., delivered the following dissentient opinion:—

This action was brought by William Jost against the Churchwardens and Vestry of the Parish of St. George's for use and occupation, and by an amended count for mesne profits of land in Halifax. The Churchwardens and Vestry deny the allegations in plaintiff's declaration, and traverse the plaintiff's title or right to possession of the land. The plaintiff put in evidence a deed at the trial, but failed to establish as we, I believe, all thought at the argument, any title to the land.

I need not go into the recitals in the deed, or construe that instrument to shew that plaintiff has no legal or equitable claim to the land which was given for the benefit of St. George's Parish. The plaintiff relies for mesne profits on a judgment against the defendants in ejectment for the land in question, and he pleads a record in a former suit. Respecting a number of facts mentioned by the learned Chief Justice I am with all deference unable to see how they are to be considered, as we were, I thought, confined to the report of the evidence given on the trial at the last April Sittings. On the trial a record was tendered in evidence of the former suit, and, on the objection of defendants' counsel, rejected, and a nonsuit was moved for on several grounds, which was granted, with leave for plaintiff to move to set it aside. Could the record have been received under this replication? The plaintiff has set forth in his replication a suit by plaintiff in ejectment against

one Davis, that Davis appeared to the suit, and that afterwards, on the 13th of April, 1875, by order of a Judge, "the defendants,"—these are the words—"in this action were admitted as *landlords* to appear and defend said ejectment suit," etc. The record tendered corresponds with the recital of the suit in ejectment and the appearance of Davis thereto, and then recites that the said defendant, (Davis.) on the 13th of April, 1875, obtained an order from the Chief Justice in the words following; "I do order that the Churchwardens and Vestry of St. George's Parish be permitted to appear and defend the above action *in their own name.*" Then, in the replication, after recital of the defendant's plea, proceedings are recited on the 6th day of May, A. D. 1875, before Mr. Justice McDONALD, "when came the said William Jost and the said Churchwardens and Vestry, and also a jury, who, being sworn to try the matter in question between the said parties, found that William Jost, on the 16th of February, was, and still was on the 6th of May, 1875, entitled to the possession of the land in question." In the record tendered it is set out that afterwards, on the 27th of April, 1875, at Halifax, before SIR WILLIAM YOUNG, C. J., and his Associate Justices, assigned to take Sittings for the within county, "*came the parties* within mentioned," and a jury being sworn "to try the matter in question *between the said parties*," say that William Jost, within mentioned, on the 16th of February, A. D. 1875, was *and still is entitled* to the land mentioned. The plaintiffs tendered in evidence the pleadings, verdict, rule *nisi* for new trial, rule discharging the same, and other papers in the former suit of *William Jost* v. *James Davis*, which were received without objection. The verdict is as follows:—

IN THE SUPREME COURT.

HALIFAX, SS.

Cause—William Jost, Plaintiff.

v.

James Davis, Defendant.

Jury sworn 5th day of May. Verdict for plaintiff recorded in open Court this 6th day of May, 1875.

C. H. HEPWORTH, *Foreman.*

M. I. WILKINS, *Prothonotary.*

On the trial the day after these papers were read in evidence, and after the record was produced and counsel was heard in objection to its being read, plaintiff's counsel moved, without success, to strike out of the evidence the verdict and the pleadings and rules. Some doubtful grounds of variance were raised; for instance, that the date of the trial, as appears in the record, is different from that in the replication, and that in the record the trial is alleged to be before the Chief Justice and Associate Justices, while in the replication it is alleged to be before Mr. Justice McDONALD, both fit subjects for amendment, which was not applied for. A more substantial ground of variance, and, it appears to me, a fatal ground, was taken. The record tendered sets forth, as is seen, an order on the application of the defendant, (Davis,) that the Churchwardens and Vestry of St. George's Parish should appear and defend the action in their own names, while the order set forth in the replication is that the defendants in the action were admitted as landlords to appear and defend said ejectment.

The order having passed that the now defendants should defend in their own names, could the name of Davis be any longer retained as a defendant? The allegation in the replication is that on the 6th day of May, 1875, before Mr. Justice McDONALD, "came the said William Jost and the said Churchwardens," as the parties to the suit, and this is in accordance with the order made, and by this it appears that the trial then had was one in which Davis did not appear as a party on the record. The allegation in the record, however, is that on the 27th of April, 1875, before SIR WILLIAM YOUNG, Chief Justice, and his Associate Justices, "came the parties within mentioned," and a jury, etc. The parties "within mentioned" are William Jost, plaintiff, and James Davis and the now defendants as defendants. The contention is,—and one question raised for our decision turns upon this,—that we have a distinct allegation in the pleading setting forth a record of a trial and a verdict between certain parties, and the record produced sets forth a trial and verdict where the parties are different, and it is urged that, if we are to strictly maintain rules of law and practice, this record must be held to be defective for the purpose for which it is produced, because it does not dispose of all the parties. A variance in an immaterial part of the record is

immaterial, but not so in a material part, and I think this variance is in a material part of the record pleaded and relied on.

There seems to me to be another fatal objection. The plaintiff claims the rents and profits between the 16th of February, 1875, and the 25th of May, 1876. In *Phillips on Evidence*, 333, the law is thus stated; "A judgment in one action of ejectment is not conclusive in another in consequence of the fictitious nature of the proceedings. However, it is conclusive evidence of the plaintiff's title against the tenant in possession in an action for mesne profits. * * * This judgment, like all others, only concludes the parties as to the subject-matter. It proves nothing beyond the time laid in the demise, because beyond that time the plaintiff has alleged no title, nor could he be put to prove any. As to the length of time, also, during which the tenant has occupied, or as to the value, the judgment proves nothing for the same reason." The replication before us traverses the defendants' right to plead, and claims on the ground of the former judgment the rents and profits between the dates mentioned. It recites these dates, and closes in these words; "Wherefore the plaintiff prays judgment if the defendants ought to be admitted to plead the second, third, or fourth pleas to said added count so as to make them applicable to, and to embrace the time mentioned and specified in the introductory part of this replication." The language of this replication, under which the record was tendered, reciting the proceedings after verdict, is as follows; "And afterwards, on the 25th day of May, A. D. 1876, it was considered by the Justices of our Supreme Court at Halifax that the said William Jost should recover possession of the said piece or parcel of land as by the record of his proceedings aforesaid, now remaining, etc., fully appears." The *postea* of the record before us, which was tendered in evidence, bears no date, and there is nothing in the record to shew that plaintiff is entitled to rents, or, in other words, was entitled to possession to the 6th of May, 1875, as set out by the pleading. The material date relied on by the pleading of a record limiting the recovery to a particular period, it appears to me, should appear in and be in conformity with the record produced. There was some confusion of dates at the argument,

and if the copies of papers furnished me are correct, I fail for this reason also, to understand how the writing tendered can be held to be the record pleaded.

The verdict in the former suit, put in evidence by plaintiff, shews that neither in the replication nor in the record was the fact correctly set forth. There was in reality no verdict against the defendants in this suit. It may be law that the record in question, if in evidence, could not have been contradicted by the verdict if produced by the opposing counsel. It was suggested to us that the verdict was inadvertently read. It was deliberately tendered, marked and received, and it was after it was so received that the record was offered and rejected. In *Buller's N. P.*, 233, it is said that if two tenants will defend a title in ejectment, and a verdict should be had against one of them, it shall not be read against the other but by rule of Court. And in *Vooght* v. *Winch*, cited in *1 Phillips on Evidence*, 320, it was held that a verdict obtained in a former action which had been brought by the plaintiff for the same cause, was not conclusive as evidence under the general issue, though it would have had that effect if pleaded in law by way of estoppel. Mr. Ritchie's argument was that the plaintiff, having put the verdict in evidence, was estopped from getting in a record evidently incorrectly made up. We had no authorities on this point, and the view urged by Mr. Rigby was that we must regard the verdict as in a different suit, and not the one contemplated in the record. I must confess that I have doubt as to this part of the case. It was contended that there was a good reason for rejecting the writing offered as a record, inasmuch as it did not appear by inspection to be a record of the Court at all, and no evidence was offered to shew that it was in the custody of the Court. The argument was that it should be signed by the officer of the Court, according to the practice of the Superior Courts in England previous to the reign of King William the Fourth, as required by section 2 of our Practice Act. This paper appeared to have appended the name of the plaintiff's attorney, which I do not think gives it any force or validity whatever. The present instance, where, as a matter of fact, it seems the attorney has made a record to suit his own views entirely at variance with the proceedings on which it should have been framed, and

where a verdict altogether different from that found in the case is made a part of the "record," speaks strongly against any change in the practice by which so important an instrument should be taken out of all control of the Court or its officer. It is said that the practice has been "from time immemorial" to admit such a record as this. This, it appears to me, was urged under a misapprehension of the phrase, and it is a coincidence worthy of note respecting the subject under consideration that while "time immemorial" refers to the period anterior to the reign of Richard I., the system of *recording*, in the present sense of the term in England, begins with the reign of that monarch. And it was to the time commencing with this latter period that the language of COKE, read to us on the argument, that records imported in themselves such incontrollable credit and verity as to admit of no averment plea or proof to the contrary, was applicable. This is the law that is relied on for getting rid of this nonsuit, and for establishing a practice to admit without proof any paper as a record which an attorney for one of the parties may see fit to prepare and file, I suppose, at the last moment. The language I submit of Lord COKE was never intended to apply to such a writing as we have before us, coming out of the office of the attorney, and never compared or verified, or in any way authenticated by the officer of the Court.

In the 9th Edition of *Tidd's Practice*, at page 930, the mode in which the final record is prepared is set out; "Final judgment is signed by the Master or Prothonotary on a sheet of paper called a final judgment paper, containing an *incipitur* of the pleadings." At page 931 it is said; "The judgment after verdict is entered on the issue roll, and in the King's Bench, if the roll has already been carried in * * * the *postea*, (which has already been signed by this officer,) is taken with the Master's *allocatur* to the Treasury at Westminster, and the Clerk of the Treasury continues the proceedings and enters the judgment." *Tidd* also says, page 943, that even a judgment paper signed by the officer or a *postea* is not evidence of a judgment till the roll is brought in and filed. In *Burrill's Law Dictionary* the changes which took place in the reign of George II are described as innovations upon the ancient system, apparently demanded by the times, but regarded by competent

judges with great apprehension as to their effect upon the durability of the record as a memorial of the proceedings in an action. This comment is added; "How far these apprehensions have been realized in the particular way anticipated is for English practitioners to determine, but that they have been realized in the general result of impairing the character of the record by reducing it to the level of *an ordinary instrument* privileged in no peculiar manner from change seems apparent in the material alterations which have at length been effected in England in the structure of this once inviolable and immutable memorial of judgment." The changes referred to, however, were not so sweeping as to remove the "record" from the control of the Court and its officers, and dispense with all authentication of it. They were confined to two things, namely, the substitution of English for Latin as the language of the record, and of ordinary writing for the ancient and immutable court hand.

The fee table in our statutes was referred to to shew that the attorney is to make the record, but that, I should think, if to be regarded at all, shews nothing more than that the preparation is not to be performed by the officer who may still be required to sign the record, or be called to authenticate it at any rate. We are only required to conform as nearly as may be to the English practice, and there it is said that an officer who has the care and custody of records may be examined as to their condition, but not as to their contents. In the present instance there is nothing whatever to shew that the instrument in question ever was in the custody of the Court. I think at least the officer should have been called to produce the record. The only foundation for the contention that "the record proves itself" was the peculiar principle of construction with the famous continuances by which the record was made to follow the action constantly under the eye of the Court by its own officer, step by step, from term to term, with the highest degree of precision, which preserved it, we are assured, from the slightest degree of alteration. If it is to be implied from our fee table that the Legislature has committed the preparation of this important writing to the attorney of one of the parties, I thought there could be no doubt the general rule requiring authentication would at once become applicable.

Plaintiff's counsel, on the trial, moved to amend by substituting and changing the style of defendant corporation under chapter 24 of the Acts of 1876. It was urged that this would be a great hardship if a change in the law should affect the plaintiff. But the only ground taken by Mr. Ritchie was, not that the plaintiff should suffer by a change in the law, but that plaintiff's counsel, by his amendment, having undertaken to change the name of his client, should have proved that the corporations were the same in fact. Holding the views I do on the questions already referred to, it is unnecessary for me, in the present instance, to offer an opinion on this point.

SINCLAIR *v.* WAKEFIELD ET AL.

In an action on a promissory note against a married woman defendant pleaded coverture, to which plaintiff replied, setting out an order for protection in consequence of desertion by her husband, made under Revised Statutes, chapter 86. Defendant rejoined that long before the making of the note she returned to her husband, and had since lived and co-habited with him, and was so living and co-habiting at the time of making the note, and the desertion had wholly ceased, as plaintiff well knew. The facts set out in the rejoinder were fully proved.

Held, sustaining the decision of JOHNSTONE, J., of the County Court, that the plaintiff could not recover.

WEATHERBE, J., dissenting.

THIS was an action against one Wakefield and his wife on their joint and several promissory note. The defendants severed in their pleadings. The husband's pleas were set aside under the statute as false, frivolous and vexatious, and the wife pleaded coverture. Plaintiff replied an order of protection, in consequence of desertion by her husband, made by his Lordship the Chief Justice, under Revised Statutes, chapter 86, to which defendant rejoined that before the making of said note the desertion had ceased, and that the defendant had returned to her husband and was living and co-habiting with him, as the plaintiff well knew. The cause was tried in the County Court for District No. 1, before J. W. JOHNSTONE, Judge, at Halifax, in 1878. The facts set out in the pleadings were substantially proved. The learned Judge decided in favor of defendant on the ground that the protecting order made under Revised Statutes, chapter 86, was in effect discharged by the fact of the separation ceasing, and the husband

and wife co-habiting at the time of the making of the note in suit. Plaintiff appealed from this decision, and this appeal was argued March 13th, 1879, before SIR W. YOUNG, C. J., and DESBARRES, JAMES and WEATHERBE, J J.

Tremaine, in support of appeal.—Our statute. (chapter 86 of the Revised Statutes,) is identical with the English statute, 20 and 21 Vic., chapter 85, or rather sections 1, 2, 3, 4 and 5 of our act are essentially identical with section 21 of that act. Sections 8 and 9 of our act are identical with section 8 of chapter 108 of 21 and 22 Vic. Section 10 of our act is identical with section 9 of the same act; section 11 of our act with section 10 of the same English Act. The learned Judge below seems to be of opinion and to base his judgment upon the opinion that neither the act nor the protecting order under it gives a right to sue a married woman as a *feme sole*. The case somewhat similar to this, reported in *L. R., 10 Q. B.*, 147, decided in 1875, on section 21, chapter 85, 20 and 21 Vic., shews that a woman can sue in libel or slander who is protected by such an order. That extends the right to sue given by the express terms of the statute. Our act is really stronger than the English act, in this respect, that, there being no such thing as judicial separation in this Province, our act puts the wife in the position of a divorced woman, or *feme sole*, while the English act puts her in the position of a woman subject to a judicial separation. This difference between the acts affects the duration of the ability of the woman to contract and to sue and be sued. Judicial separation ceases by renewal of co-habitation. We contend that, the woman being, while the order of protection is outstanding, in the position of a divorced woman, or *feme sole*, renewal of co-habitation alone does not discharge the order or change her position. Cites *2 F. & F.*, 80, note *a*, to shew that the order is good until discharged; also *10 C. B., N. S.*, 178.

YOUNG, C. J.—If the fact of a renewal of permanent co-habitation, of which the plaintiff had knowledge, as here, when the contract was made, does not avoid or discharge the order, it ought to.

WEATHERBE, J.—But there may not have been a ceasing of the separation; she may have employed her husband in her

house. I do not see why she could not contract with him while under the protection of the order. Can she co-habit legally with her husband after the order?

YOUNG, C. J., and DESBARRES, J.—Certainly.

WEATHERBE, J.—Then the order is good until formally discharged.

Ervin, contra.—The order here of course, I admit, follows the statute, and confers all the rights and obligations provided by the statute. In order, however, that an action may be maintained against a married woman two things must concur, the continuance of the order and the duration of the desertion. The moment the desertion which gives rise to the order ceases, the order is, *ipso facto*, discharged. In the case of *Ewart* v. *Chubb*, L. R., 20 Eq., 454, evidence was required of the continuance of the separation where an application was made to maintain a suit by a woman who had commenced the suit after obtaining an order of protection under the statute; the affidavit of the woman as to the fact was accepted. (YOUNG, C. J.—The discharge of the order does not need to be registered, like the order, according to the statute.) Cites *1 Swab. & Trist.*, 231, 235; *Ib.*, 88; *Fisher's Dig.*, 4448. There was no consideration for the making of this note by this defendant, even if she were in a position to make it.

Tremaine, in reply.—Suppose an attempt were made to seize this defendant's goods under an execution against her husband, would not this protection order, undischarged, protect those goods?

JAMES, J., now, (March 27th, 1880,) delivered the judgment of the Court:—

This was an action in the County Court by the payee against the makers of the following promissory note:

[$102.] HALIFAX, *March 13th, 1878.*

Three months after date, value received, we jointly and severally promise to pay to George L. Sinclair, or order, one hundred and two dollars.

FRED. C. WAKEFIELD.
EMILY WAKEFIELD.

This note was a renewal of a former note, for a similar amount, between the same parties, dated December 10th, 1877. The note was given in consideration of the rent of a house hired by the defendant, F. C. Wakefield, from the plaintiff, in which Wakefield and his wife, the other defendant, resided, and in which Mrs. Wakefield conducted a school. The defendants having severed in their pleadings, the husband's pleas were set aside, and the cause was tried upon the wife's pleas denying, first, the consideration; secondly, the stamping of the note; thirdly, that the defendant ever was indebted. To these pleas the plaintiff replied, taking issue on each, and, in avoiding a plea of coverture, set out the following order of SIR W YOUNG, C. J., dated the 27th of January, 1874:

IN THE SUPREME COURT, 1874.

HALIFAX, SS.

In the matter of an application of Emily Jane Wakefield, of the City of Halifax, lady, under 29th Victoria, Chapter 33, Provincial Acts of 1866, entitled, "An Act for the Protection of Married Women in Certain Cases," on hearing read the affidavit of Emily Jane Wakefield, dated the twenty-fourth day of January, instant, and the affidavit of Henry Lawrence Sturdee, Esquire, of Saint John, New Brunswick, dated the nineteenth day of January, instant, whereby it appears that the said Emily Jane Wakefield was deserted by her said husband, Frederick C. Wakefield, in the month of May, 1872, without reasonable cause, and that the said Emily Jane Wakefield has since then been, and still is obliged to maintain herself wholly out of her own property and earnings; and on motion, I do order that the earnings of the said Emily Jane Wakefield and any property which she may have possessed or acquired at the time of the said desertion, or may have since acquired, or acquire hereafter, shall be, and is hereby protected against her said husband, his creditors, and all persons claiming under him, the date of said desertion being for the purposes of this order fixed at the thirty-first day of May, 1872.

Dated at Halifax, this twenty-seventh day of January, A. D. 1874.

W. YOUNG.

To this replication Mrs. Wakefield rejoined that about the year 1876, and after the making of the order, and long before the making of the note set out in the replication, the defendant returned to her husband, and has since lived and co-habited with him, and at the time of the making of the promissory note she was living and co-habiting with her husband, and the desertion mentioned in the order had wholly ceased and determined, as the plaintiff well knew.

The facts set out in the rejoinder having been fully established in evidence, the learned Judge of the County Court, waiving the question of the consideration of the note raised by the pleadings, decided that, whether the order of protection had been revoked by the cessation of the desertion or not, no right accrued to creditors to sue the wife on her contracts made after the desertion had ceased, and therefore he gave judgment for the defendant.

Feeling the necessity, at this first formal discussion of this important statute, either here or in England, of putting upon it a sound construction, it has received from the Court very careful consideration, and the conviction on my own mind, a conviction strengthened at every step of the enquiry, is that the decision of the County Court Judge is sound, and ought to be sustained. It is not necessary in this case to decide whether the order was totally abrogated by the reunion of the parties so as to protect her from suing or being sued on her contracts made during the separation, nor whether their reunion gave her husband or his creditors power over her property acquired during the separation, nor, if it did not, whether there is in this Province any Court or any legal process by which, after such reunion, her separate property can be protected against her husband or his creditors. The English act is by no means clear or explicit on these questions and several others which might be suggested, and ours is still more defective, and the difficulty in construing the statute is increased by the almost total absence of decisions upon it in the English Courts; nor was any treatise upon its clauses cited at the argument. The tendency of my opinion is that the order was not totally abrogated by the reunion, but remains in force in relation to any of the wife's transactions during the desertion, and would be enforced either by the Equity Court,

or, as in England, by the Divorce Court. But I am of opinion upon several grounds that a public and *bona fide* resumption of co-habitation by the parties, such as occurred in this case, abrogates the order in relation to subsequent transactions, so much so that in case of a subsequent desertion a new order for protection would be necessary. Whether a reunion of the parties were public and *bona fide* or not, would, of course, be a question for a jury to decide. The spirit of the English law is to discourage anything like separation of the interests of husband and wife. In the United States this sentiment is more loosely held, not only by individuals, but by Legislatures and Courts of Justice, and, in view of the spirit of English legislation, I think we must look for strong reasons and clear expressions in a local statute to induce us to construe it in so important a matter so as to arrive at conclusions entirely differing from the English statutes in *pari materia*. If the contention on the part of the plaintiff in this case be sustained, a man and his wife may live together for half a lifetime, in the face of the public, fulfilling towards each other all the duties of the married life, and yet each of them capable of doing business on his or her separate account, each capable of suing and being sued separately, and neither of them in any way responsible for the acts of the other in business transactions. They may conduct rival commercial establishments; one may get rich while the other is drifting into hopeless, and, perhaps, discreditable insolvency, while they are living in the same house, dining at the same table, and, when the toils of the day are over, sharing the same couch of repose. They may give credit to each other, and use each other's notes, accept each other's bills, and in case of disagreement they may sue each other at law, seize each other's property under execution, or incarcerate each other's bodies in jail for debt; or, on the other hand, they might inaugurate a happier state of affairs and one more calculated to preserve connubial harmony, by entering into partnership under the firm of A B & Wife, that is, if they did not happen to quarrel when they were going home at night over the division of the day's profits. The ludicrous result which would follow such a construction of the statute would, however, be of little consequence in comparison with the enormous openings which it would create for fraudulent

transactions. Let it be proclaimed and understood that this is the law and we will soon be flooded with orders for protection collusively obtained for the purpose of enabling the parties to do business separately while living and bringing up their children together at home in all respects as if there had been no protection order. The evils such a law would produce in the social and domestic, as well as in the commercial world would be enormous.

The order provided for by the statute is altogether based on the "desertion" of the husband. Cruelty on his part, drunkenness, extravagance, or even infidelity afford no grounds for an order of protection. The wife cannot get the order, even in case of desertion, if the husband is ready and willing to provide for her support; *Cargill* v. *Cargill*, 1 Sw. & Tr., 235. So long as he is willing either to live with her or to provide for her, the law affords her no protection for her earnings, nor even for a legacy left to her, against her husband or his creditors. He leaves her for a time and she gets an order of protection. By-and-bye he returns, and they are reconciled, and resume co-habitation. She may have accumulated property or started a profitable business, or received a legacy in his absence. Feeling herself no longer a free agent, and fearing that if she goes on with her business what she has earned may be dissipated in consequence of her husband's interference in her business, she applies to a Judge to abrogate the order, but she is told that it cannot be done as the act does not provide for it. If it can be abrogated at all, which, under the act, is doubtful, except on the ground that it ought not to have originally passed, it must be done at the instance of the husband or a creditor. She asks the husband to make the application, but it is his interest to live in idleness on her earnings and at her risk. If she succeeds, he gets the benefit. If she fails, the creditors cannot look to him for redress. Her earnings, in spite of the order for protection, are at his mercy. She is in a hopeless position, from which the law allows her no escape, and the order intended for her protection becomes an engine of oppression, unless, as is more probable, it is made by their collusion an engine of fraud towards third parties. How much more rational is the argument that when the desertion ceases, the order, except as to previous transactions, ceases also? Can

there be a stronger or clearer case for the operation of the maxim *cessante ratione legis cessat ipsa lex.* I think section 5 must be interpreted in the light of this maxim. It says that during the continuance of the order the wife shall be deemed to have been "during such desertion of her" in the same position . . . . . as if she had obtained a decree of divorce. Does not this clearly indicate that when the desertion ceases she shall cease to be in the same position? But the statute says she shall be in the same position as if she has obtained a "decree of divorce." That is, *during the desertion* she shall be in that position. The English statute says "she shall be in the same position as if she had obtained a decree of judicial separation," which in England is terminated by re-cohabitation. But we have no decree of judicial separation in this Province, and it is contended that our statute, by using the expression "decree of divorce," indicates an intention that the order shall be perpetual; that, as in the case of a divorce, its duration should be co-extensive with the joint lives of the parties. I think this is an extremely violent assumption. The language of the statute and I believe still more its spirit and intention will be fully satisfied by construing it to mean that "during the desertion" it shall operate as if she had obtained a decree of divorce. It is not at all necessary, in order to give full effect to the words of the statute, to hold that the words "a decree of divorce" indicate anything more than this, and I do not understand them to mean that the order shall, if not formally abrogated, be as unalterable as either a decree of divorce or as a law of the Medes and Persians. On the contrary, I consider that the words, "a decree of judicial separation" in the English act, and a "decree of divorce" in ours alike refer, not to the extent of the continuance of the order, but to its operation and effect while it does continue, which by the clause is expressed to be "during such desertion."

It is true that section 7 of the act, if read without reference to the rest of the statute, would seem to indicate that the order would remain in force "until reversed or discharged" for the protection of creditors, but it is only "so far as is necessary for the protection of any person or corporation who may deal with the wife." I am free to admit that if there is only a secret or occasional co-habitation of the parties, of which a

creditor has no notice, and which he could not reasonably be expected to know, he would be protected by this clause as against the wife and her separate property. So far protection to the creditor is "necessary" but no further. If he has notice of the cessation of the desertion, or if the circumstances were such that a prudent and careful man may have and ought to have known of it, (a question easily enough determinable by a jury,) in that publicity or in that express notice he has the "necessary" protection which the act intended to give him. But we are not left in doubt on this point. Section 11 of our act corresponds with section 10 of the English act, 21 and 22 Vic., chapter 108, with the exception of the words which I have placed in italics in the clause of our statute which I now transcribe, and which were evidently inserted to make our act conform to the English act on this very point; "Section 11.—All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to or permit any transfer or act to be made or done by the wife who has obtained the same, shall, notwithstanding such order or decree shall have then been discharged, reversed or varied, *or at some time since the making of the order or decree been discontinued*, be protected and indemnified in the same way in all respects as if at the time of such payment, transfer or other act such order or decree were valid and still subsisting without variation in full force and effect, *and the separation of the wife from her husband had not ceased or been discontinued*, unless at the time of such payment, transfer, or other act such persons or corporations had notice of the discharge, variation, or reversal of such order or decree."

Why were these words inserted? The statute makes no provision for registry of any discharge of the order as it does in respect to the order itself, so as to affect creditors with constructive notice that they are no longer to deal with the wife as a *feme sole*, and this clause is inserted to provide that they shall be entitled to actual notice. But notice of what? And why did the statute depart from the English act by the insertion of these most significant words? The English act did not require them because the terms of the act made the order tantamount to a "decree of separation" which is terminable by re-cohabitation. But the framers of our statute

had used the term, " decree of divorce," and these words were evidently inserted upon the consideration that this expression might be understood as referring to the *continuity* of the separation; therefore they meant by this section that it shall not be so understood. The language of the first interlineation is, " notwithstanding such order or decree may then have been *discharged, reversed, varied or discontinued,*" and the second interlineation uses the same word in connexion with the word " separation ;"—" in full force and effect, and the *separation* of the wife from her husband had not ceased or been *discontinued,* shewing that the " discontinuance " of the " order " in the first interlineation means the " discontinuance " of the " separation," and that notice of this discontinuance was equivalent to notice of reversal. In this case there was notice to the creditor, and also to his attorney, proved beyond all doubt, in fact, admitted, and so found by the Judge.

There is only one English case bearing on this question, (*Ewart* v. *Hall,* L. R., 20 Eq., 454,) shewing that two Judges, acting at different states of the case, either received or required evidence of the *continuance,* not of the order, but of the *separation,* in order to enable the wife to receive a legacy, and I cannot help thinking that if the published decisions of these two Judges were erroneous, they would have been since overruled; on the contrary, it seems that no question exists in England that the construction of the Act is as they have stated it. But I ought to notice that they have arrived at this conclusion without the aid of the words interlined in section 11 of our act, which lead me irresistibly to the same conclusion. The construction I have adopted is the strict literal construction of the act, and it brings our law into harmony with the English statutes.

I have no doubt, (except such as may arise from my respect for the decisions of learned brethren who may differ from me,) that the appeal in this case ought to be dismissed with costs.

SIR WM. YOUNG, C. J.—As there is a difference of opinion in this case, I have thought it well to add a few words illustrating my own. It would have been a great improvement on our Act of 1866 had the framers of it taken as a model the Upper Canada Act of 1859, which extends the order of pro-

tection to many other cases besides the desertion of the husband and requiring it fully as much The seventh section of that act enables the woman, as well as the husband and the husband's creditors, to apply for a discharge of the order, which our act does not. I may remark, too, that since the passing of our act, the Imperial Legislature has taken a step far in advance of ours. The 45th volume of the *Law Times*, fol. 283, contains the report of a select committee of the House of Commons in 1868, reviewing the state of the law up to that time in England and in the United States and Canada, awarding the chief praise to the State of New York. This report and subsequent inquiries led to the Imperial Statute of 1870, the 33rd and 34th Vic., chapter 991, greatly extending the rights and privileges of married women, and embracing the leading Equity doctrines for their protection, Looking to these examples, it is our duty, I think, to give the most liberal construction to our own act, and, in view especially of the 3rd and 5th sections, I am of opinion that our judgment should be for the defendants.

WEATHERBE, J., read the following dissentient opinion :—

The wife, a defendant in this case, obtained an order under chapter 86 of the Revised Statutes, to protect her earnings and property which is still outstanding and undischarged. The plaintiff, on the strength of the order of protection, dealt with the wife, and the dealings form the subject of this action on a promissory note.

The following are the words of section 7, which we are required to construe ;—"In every case in which a wife shall, under this chapter, have obtained an order to protect her earnings or property * * * such order * * * shall, until reversed or discharged, so far as is necessary for the protection of any person * * * who shall deal with the wife, be deemed valid and effectual." I thought there was no difficulty in construing this clause, and I am of opinion that it was framed to meet such a case as has now arisen. It has been suggested that under such a construction the parties while living together might do business with *each other*, and even enter into partnership, and might proceed to judgment and execution against each other. This, I think, would be no argument against the plain and obvious intent of the words,

even if any difficulty could be found in following the words to such results. But the statute itself distinctly meets the suggestion. It says that the wife obtaining such order shall be *in a like position in all respects* with regard to property and contracts, and suing and being sued, as she would be *if she had obtained a decree of divorce.* Then if the order is to be in force without actual and continuous desertion at the time of the wife's dealings or contracts, great frauds, it was said, might result from an order collusively obtained. I do not understand how collusive orders of protection would facilitate the perpetration of frauds, and in any case the objection is only against fraudulent and collusive orders, and seems to me beside the question.

It was urged that the words, "during such desertion," occurring in section 5, limit the expression, "during the continuance of the order," in section 7. The words "and be" after the word "be" in the second line of section 5, were omitted in our act in copying the English statute, which gives our act a different meaning, it is said. The words, "be deemed to have been during such desertion," were evidently intended in the English act to refer to a period anterior to the order, and to correspond with that provision of the statute requiring the time of the commencement of the desertion itself to be stated in the order; and this admittedly protects property of the woman here, as in England, acquired previous to the date of the order. Notwithstanding the omission in our act, I can see no difficulty, even in construing section 5. It is admitted that the obvious meaning of section 7, read by itself, renders defendant liable, but the scope of the act limits the operation of the order to the period of desertion as matter of fact, except in cases where a plaintiff has been without notice of the cessation of desertion, in which case he shall always recover. This reduces the question to one of notice. By section 11 of the statute not only is the wife liable while the order is unrevoked, but even after it is discharged she may be liable to a creditor without notice relying on the order. The provision respecting notice in section 11 seems to me to dispose of the view that the order shall be deemed valid and effectual, under section 7, to all dealing with the woman except those with notice of actual desertion. Notice is not mentioned in section

7, and I think the rule "*expressio unius est exclusio alterius*" applies in this case.

The case of *Ewart* v. *Hall*, L. R., 20 Eq., 456, was relied on by defendant's counsel. But, assuming the case to be in point, there is nothing to shew, I think, that the evidence required of the continuance of the desertion may not have been an affidavit of the continuance unrevoked of the order. In law the "desertion" continues, I should say, while the order remains.

WOOD *v.* ALLAN.

PLAINTIFF brought action to recover damages for injuries caused to her luggage on defendant's steamship in consequence of the breaking of a dummy or side-light, which, although not constructed according to the latest patents, was such as had been in use for vessels of that class. The ticket for the passage was issued under the Imperial Act, 18 & 19 Vic., chapter 119, which required conditions forming part of the contract to appear on the face. On the face of plaintiff's ticket was a direction to "see back of ticket," and on the back was printed a condition that defendant was not to be responsible for loss resulting from shipwreck or disaster of the sea. The carpenter swore that he had examined the dummy every day before the day when the luggage was injured, and had seen it at ten o'clock on the morning of that day. The only evidence of negligence on his part consisted of unsworn statements of the captain and other officers, as testified to by one of the witnesses, that the damage had been caused by the negligence of the officer whose duty it was to visit and inspect the luggage room.

Held, that the plaintiff was bound by the conditions, and that the verdict for plaintiff, based upon the imperfect construction of the dummy and the negligence of the defendant's servant, must be set aside.

THIS action was brought to recover damages for injuries to the plaintiff's luggage, on a voyage from Liverpool, England, to Halifax, in the defendant's steamship *Hibernian*. The substantial defence was that the luggage was received to be carried under a special contract that the defendant was not to be responsible for injuries resulting from shipwreck or disaster of the seas. It appeared that a dummy, which was described as a cast iron door for a side light, and which was abreast the after hatch, had broken across the middle, and the salt water had in consequence gushed in and injured the luggage. The question was whether this was an injury resulting from a disaster of the sea, or from the negligence of the defendant's servants. A question was also raised whether the plaintiff was bound by conditions which did not appear on the face of the ticket. The cause was tried before SIR WILLIAM YOUNG, C. J., who found for the plaintiff

for $446, and a rule was taken to set aside the finding, which was argued before SIR W. YOUNG, C. J., RITCHIE, E. J., SMITH and WEATHERBE, JJ.

Ritchie, Q. C.—There is no evidence whatever of any negligence on the part of the defendants in this cause. The dummies were the ordinary dummies used in that ship, and the defendants are not bound to use all the new patents. The breaking of them was a very unusual occurrence. There is no pretence that they were improperly constructed. I think this is a case where the Judge has undertaken to give judgment without evidence. The ship's carpenter was not believed by the Judge, but his evidence was uncontradicted, that he examined the dummy every morning, and that he did so on the morning of the accident. The only evidence that contradicts him is that of Mr. Wood.

Smith's alleged statement was evidently only a matter of conjecture. The Judge has found that the dummy was not broken coming out of the dock. The case would have been different if it had been broken and the defendant had allowed it to remain so. The captain says he is sure it was not occasioned by going out of the dock. When the water was known to be coming in it was at once repaired. *Nugent* v. *Smith*, L. R., 1 C. P. D., 19; reversed *Ib.*, p. 43.

The defendants are not responsible for the safe keeping of the luggage; *L. R., Scotch & Div.*, Ap. 470, 473; *L. R., 1 Q. B. D.*, 515; *L. R., 4 Q. B.*, 539, 545; *L. R., 1 C. P. D.*, 618; *7 Exch.*, 707; *3 H. & C.*, 135; *10 C. B.*, N. S., 453.

Tupper contra.—Defendants seek to avoid liability as insurers under special act, *18 & 19 Vic.*, chap. 119, sec. 71. This is the act upon which they must rely, as the ticket is based on that act. That clause compels them to place their notice upon the face of the ticket. The face I think means the front. The schedule to the act confirms this view.

There is not a particle of evidence upon which that ticket could be admissible to bind the plaiatiff. This is not a ticket for Miss Wood. It is a joint ticket for Mr. and Miss wood, got by Wood from the steward. It is not proved that this is the ticket she had. He does not know, except from what the steward may have told him, that this ticket was got from

Miss Wood at all. Wood says he had a separate ticket. This ticket produced here is a joint ticket. (RITCHIE, E. J.—The Chief Justice has found the fact that this was her ticket.) Admitting for the sake of argument that the counsel of defendant can show there was no bargain, the moment we showed that the breakage had happened the burden was on him to show that he had the benefit of conditions as to peril of the sea, *i. e.*, that the accident was caused by perils of the sea; *5 Q. B.*, 747; *Carpue* v. *London and Brighton Railway Company*, 109 Mass., 398.

This dummy was used only on this one ship, and it has been abandoned. It was negligence to experiment with such dummy in such a place.

In *Nugent* v. *Smith* the duty of defendant to prove that the accident was due to perils of the sea was admitted. *6 M. & S.*, 140; *4 Bing.*, 222; *2 Starkie*, 280; *2 Camp.*, 415.

SMITH, J., now, (March 27th, 1880,) delivered the judgment of the Court:—

This is an action brought by the plaintiff to recover from defendant damages for injuries done to her luggage by the sea on the voyage from Liverpool, England, to Halifax, N. S., in the steamship *Hibernian*. The defendant has pleaded eight pleas. The only ones, however, to which it will be necessary to advert, under the findings of the learned Chief Justice, who tried the cause, are the fourth and fifth, which set up the substantial defence to the action, and under which it is sought to relieve the defendant from his liability as a common carrier. They allege that the luggage in question was received to be carried from Liverpool to Halifax on a "special contract in writing, subject to certain conditions and provisoes therein contained, one of which conditions was that defendant was not to be responsible for the safe keeping during the voyage and delivery at the termination thereof of the baggage of the plaintiff, nor from loss of property arising from shipwreck or disaster of the seas." At the trial a verdict was given by the Chief Justice for the plaintiff for the sum of $446, being alone for the injury done to her personal luggage, deducting, as I think most properly, a demand for damage done to articles belonging to another. A rule was obtained to set aside this

verdict, which was argued during the present Term, and we are now to ascertain whether, in view of the law and the evidence, the decision can be sustained.

The facts of the case are briefly these. In 1876 the plaintiff took passage, at Liverpool, England, on board the steamship *Hibernian*, known as one of the Allan Line, for Halifax, and received a passenger ticket required to be given under section 71 of 18 & 19 Vic., cap. 119, Imperial Statutes; that some five or six days after leaving port it was discovered that a great deal of the luggage of the passengers, which had been placed between decks, had been damaged by salt water. Upon examination by the carpenter, it was found that the dummy abreast of the after hatch was broken across the middle, and the water was, to use the carpenter's own expression, "gushing in whenever the ship rolled over." The dummy is described by a witness to be "a cast iron door for a side light, and about twelve inches in diameter on the outside." It has a bolt in the centre of it, with a cross bar inside the ship which screws up.

The sole question, as I apprehend it, is to ascertain from the evidence whether the injury to plaintiff's luggage arose from a peril or disaster of the sea, referred to in the condition on the back of the ticket, or from the negligence of the defendant or his servants. If it was from the former, the plaintiff cannot recover; if the latter, the defendant is liable. It was urged at the argument, and with much force, that the plaintiff could not be affected by the conditions on the back of the ticket, inasmuch as the section of the Imperial Act under which such tickets are required, requires only what appears upon *their face* to be obeyed. I have with some care looked into the authorities on this point, and can find no case where this has been held where, on the face of the contract or ticket, a plain direction to the conditions on the back is to be found. In *Harris* v. *The Great Western Railway Co.*, L. R., 1 Q. B., 515, the conditions were held to be part of the contract. It can hardly be imagined that the plaintiff could be unaware of the conditions when, on the face of the ticket, the words are plainly written; "*See back of ticket.*" I think, therefore, that to enable this verdict to be sustained, we must hold that there is evidence to establish that the damage done to the luggage

resulted, *not* from a disaster of the sea, but from the negligence of the defendant's servants. The learned Chief Justice has rightly, I think, found that the injury to the dummy was not occasioned by the ship striking the dock in leaving Liverpool, but he seems to base his decision upon two grounds,—first, that the carpenter, Smith, "was guilty of neglect in not visiting the baggage room, so as to detect and remedy the friction of the dummy at once;" secondly, that the injury to the dummy "was the result of imperfect construction and the action of the sea," which the condition does not cover. The only evidence which can attach the slightest culpability or neglect to Smith is to be gathered from the statements made by the captain, as testified to by Mr. Zachariah Wood. He says; "I heard the captain and officers of the vessel repeatedly state that the damage to the said luggage had been caused, not by the perils of the sea, but by the omission of the officer whose duty it was to visit and inspect the luggage room for several days after leaving port, but who had not done so, whereby the open port hole had not been discovered." The defendant cannot clearly be affected by the assertions of any officer beside the captain, and therefore we have only to contrast the value of his admission, not made under oath, and almost certainly outside of any personal knowledge, with the *sworn* statement of Smith, who had been for many years in the company's employ, and still was retained by them. It is evident that the captain could not have been cognizant of the fact of this alleged neglect of Smith during its continuance, or he would have immediately seen to its remedy. He must have been made acquainted with it after the injury, and probably from some one who has not been examined, and whose statements could not bind Smith. Now, what does Smith *swear to*, the only one examined who could speak to the fact? He says; "I had seen that dummy about ten o'clock on the morning of the same day, (*i. e.*, the day of the discovery.) It was perfectly good then, and no sign of any water about it,—no sign of any water then between decks. I had examined it every day before that. It was customary to examine them every morning during the voyage. The first thing I do after the ship clears the dock is to go down and examine the side lights. I did so on that voyage." I cannot bring myself to believe this man to

have perjured himself simply upon an admission made by the captain, not under oath, and made under the circumstances already adverted to,—an admission possibly derived from information of a character unreliable.

I do not find any evidence which enables me to decide that the injury arose from a defective construction of the the dummy. It *may* have been so, but I can see no testimony to enable me so to conclude, and therefore I think we must hold the damage to come within a "disaster of the sea."

I regret to differ from the learned Chief Justice, who probably may be right, but I think the rule *nisi* to set aside the verdict must be made absolute.

SIR WILLIAM YOUNG, C. J.—My decision in this case turned entirely upon the credibility of the witnesses. The plaintiff's luggage was destroyed, and the breaking of the dummy, as it was called, occasioned the injury. It was of the old fashioned sort, and there was no storm or commotion of wind or water to break it in. The defendant was liable for any negligence of his servants, and, if the carpenter was to be believed, there was no negligence. He had a direct and powerful inducement to exempt himself, but if he were free from blame, it was surely most unlikely that the captain and his officers, or the captain in presence of his officers and of young Wood, would repeatedly state that the damage to the luggage had not been caused by the perils of the seas, but by the omission of the officer for several days to visit and inspect the luggage, as was his duty, whereby the open port-hole had not been discovered. If this was said by the captain and was true, as I believe it was, the plaintiff was entitled to a verdict for damage done to her own clothing, and which any jury, I think, would have given her.

RITCHIE, E. J.—The learned Chief Justice, who tried this cause without a jury, has found that the ticket produced was that of the plaintiff, and that she had notice of the conditions on it, wherein it was expressly stipulated that neither the agent nor owner of the steam-ship should be responsible for the safe keeping of her luggage during the voyage, or loss of property arising from disaster of the seas; but he found for

the plaintiff on the grounds of neglect of duty on the part of the carpenter of the ship and of the improper construction of the ship, the injury to the luggage having been caused by such improper construction and the action of the sea.

After the most careful consideration of the whole evidence, I cannot see neglect of duty on the part of the carpenter or anything to lead to the impression of any improper construction of the ship. The only evidence relates to the dummy, the breaking of which during the voyage caused the leak which occasioned the damage. The dummy was such as had been in use for vessels of that class, but patent dummies are now in use which are deemed better and safer; but, such as it was, Capt. Wood, a witness on the part of the plaintiff, describes it as made of composition and glass, fastened by a bar of iron and screws. It was possible but not probable that it was broken by the sea. He had often seen them on ships of an old fashioned sort. I do not consider that ship owners are bound, in order to have their ships considered seaworthy, to adopt every new and supposed improvement. If this luggage had been insured by the owner, she could surely have recovered from the underwriters. As vessels are built from time to time, the last built may take advantage of improvements in the construction of vessels and machinery, but the introduction of such improvements in those ships does not render the older vessels unseaworthy which do not adopt them. I think that there should be a new trial.

WEATHERBE, J.—The argument mainly relied on before us was that the conditions endorsed on the ticket were not binding on the plaintiff, and that therefore the defendant was subject to the ordinary liability of a common carrier, but the authorities are clear that a reference on the face of the ticket to the conditions endorsed on the back is a compliance with the statute.

The claim is for damage to a passenger's luggage from sea water which entered at the port-hole in consequence of a fracture in the covering or dummy. The learned Chief Justice who tried the cause has found that the goods were injured by reason of the neglect of the carpenter in not visiting the baggage room so as to detect and remedy the fracture in the

dummy, caused by imperfect construction. The question here is, whether on the evidence before us, unseaworthiness as to the dummy and negligence of the carpenter are made out sufficiently to support the verdict, and I do not think there is evidence to support the contention that the vessel was imperfectly constructed in the part through which the damage to the goods was sustained, or that there was shown neglect in the carpenter in not anticipating the fracture by which the sea water was admitted. And for these reasons, I am of opinion there should be a new trial.

O'TOOL *v.* HOOPER.

APPEAL from the County Court dismissed where the defendant, appellant, in taking out his rule, had, through a clerical error, referred to the appeal as being taken on the part of the plaintiff.

Q. Whether the rule for appeal is among the papers requiring to be certified by the Judge under the County Court Act of 1874.

IN this case an appeal was taken from the County Court, and the rule for appeal was not among the papers certified by the Judge. A paper purporting to be the original rule was, however, sent up with the other papers.

Rigby, Q. C., contended that the appeal must be dismissed, citing *Freeman* v. *Moran*, 3 R. & C. 166; Acts of 1874, chapter 18, section 53.

YOUNG, C. J.—Here are the papers in the cause and what purports to be the original rule. I am opposed to dismissing an appeal in such a case.

WEATHERBE, J.—I admit it to be a nice point, but I think that the rule for appeal is not included in the statute. If it is, the appeal must be dismissed. There are papers not included in the statute. If certain papers are required to be certified, it means that others need not be certified. I may come to the conclusion that the rule is included in the statute, but I would not dismiss the appeal unless the statute expressly says so. Even in cases where the statute says so a discretion is allowed.

YOUNG, C. J.—The case of *Freeman* v. *Moran* is not the same as this.

Rigby, Q. C.—Your Lordship said it would be a most unjust thing to dismiss an appeal on a technicality. That appeal was dismissed on a technicality, and I only ask you to apply the same principle here.

WEATHERBE, J.—I would not hold to the case quoted for a moment, and if a decision is wrong it is not only the right but the duty of the Court to set itself right. If I considered that the rule was included in the statute, I would be with you.

Meagher.—In *Freeman* v. *Moran* the papers were essential to the argument. (WEATHERBE, J.—The rule is as essential as a piece of testimony. We cannot draw a distinction.) In a New Brunswick case, where papers which were required were not sent up, the case went over until the defect could be remedied.

The decision was reserved, and a formal rule *nisi* was moved for on a subsequent day to dismiss the appeal on the ground above indicated and others.

Meagher, now, (February 21st,) shewed cause, reading an affidavit to prove that anything in the papers indicating that the appeal had been taken on the part of the plaintiff was a mere clerical error.

YOUNG, C. J.—Can we amend?

Meagher.—There is a decision in *Thomson's Reps.*, p. 3, where the Court amended the grounds of appeal from the Probate Court. If the Court could amend there they can do it here. If fresh security is required, we can give it. (WEATHERBE, J.—I question whether we can amend a rule of the Court below, but it might be sent back.) I ask that it be either amended or sent back. The substantial parts of the appeal have been complied with. It was perfected the moment the bond was filed. The order is formal. Cites *Woodill* v. *LeCras*, (*ante*, p. 7,) per JAMES, J.; *18 C. B.*, 826, *per* JERVIS, C. J.; *16 C. B., N. S.*, 201, remarks of WILLES, J. The objection should have been taken earlier. If the appeal was taken for the plaintiff, it should have been abandoned long ago, and we should not have been put to the expense of preparing for argument.

Rigby, Q. C., contra.—*Mooney* v. *Smith* was stronger than if there had been a mistake, because that cause was in this Court. This Court has no control over the Judge below, and can give no direction to the Judge below except so far as the statute authorizes. It may be sent back and the Judge below can deal with it. Refers to *Woodill* v. *LeCras*. The appeal there was no appeal at all. It was sent back and a regular appeal granted, which I took out a rule to set aside, and it was set aside on the ground that the application was made too late. This is a statutable appeal taken where an appeal is refused by the Judge. The rule here is a rule on behalf of the plaintiff to set aside the plaintiff's judgment. Mr. McKay swears that an appeal was had and perfected on behalf of the defendant. That, certainly, is not the appeal here. In reference to amendment, the Probate Act, Revised Statutes, 408, enables such direction to be given as the Court may think necessary. This Court can only amend causes in the Court.

Meagher, in reply.—The appeal is completed by the filing of the bond so far as the Court below is concerned. The rule is merely the means of communicating it from that Court to this.

THE COURT, (April 5th, 1880,) dismissed the appeal on the ground that they had no power to amend the rule, which was inconsistent, in that the judgment below was for plaintiff, and the defendant, in taking out his order, had referred to the appeal as being taken on the part of the plaintiff.

PEPPIT *v.* NORTH BRITISH INSURANCE CO.

PLAINTIFF recovered a verdict on a policy of insurance for $2000, subject to the opinion of the Court. After the argument of a rule *nisi* and before judgment pronounced on the rule, the parties entered into negotiations for a settlement, the result of which was that plaintiff, about a fortnight before the delivery of judgment, accepted $1000 in full of his claim, and delivered up his policy to the company. Judgment was afterwards given in his favor for the full amount of the claim, and a rule *nisi* was taken by defendants to compel the plaintiff to file a discontinuance, or, in the alternative, that all proceedings under the judgment should be stayed. The Court refused to interfere with the plaintiff's common law right to enter judgment, but stayed execution for thirty days, that defendants might take such steps as they might be advised.

THIS matter came before the Court on a rule *nisi* that a discontinuance should be filed by the plaintiff's attorney, or in the alternative, for a stay of proceedings on the judgment

pronounced for the plaintiffs, December, 1879, (*ante* p. 219,) on the ground that the cause had been settled, and the plaintiff had been paid $1000 in full of his claim.

SIR WILLIAM YOUNG, C. J., now, (April 5, 1880,) delivered the judgment of the Court :—

The facts in this case I know only from the four affidavits on file, two of them as the foundation for the rule *nisi*, granted on the 24th January last, and the other two in reply, from which I gather, that the action was brought by summons in July, 1875, on a policy of insurance for $2000, and was tried, when the plaintiff had a verdict subject to the opinion of the Court, that it was argued, and the want of proof of the policy and some technical grounds having been urged, judgment was deferred till the opening of the present term, when it was rendered by the four Judges who heard it for the plaintiff with costs. Until it was delivered the defendant's Counsel believed that it would be for the defendants, and the same belief, or at least the dread of it, extended to the plaintiff and his professional advisers, or some of them. His principal Counsel and his Attorney on the record, now deceased, was too unwell to be consulted. Under these circumstances a negotiation was entered into, and on the 22nd of November last, an agreement was signed by Mr. Dodd, who had been the Attorney of the plaintiff and in his name, and by Mr. J. C. Hill as agent for the defendants, that the action should be discontinued on payment, by the defendants to the plaintiff, of the sum of $1000 in full of all demands for principal, interest and costs. On the 25th of November this sum is accordingly paid to the plaintiff, who signs the receipt for it himself in full of his claim, which claim it says is hereby discharged and said policy is herewith delivered up to said Company. Fourteen days after, on the 9th of December, the plaintiff had judgment for his whole amount to the surprise of the defendants' counsel, as he declares in his affidavit, and still more acutely, to that of the plaintiff. He refuses, therefore, and so also his counsel declines to be bound by his agreement and receipt, and by the rule *nisi* it was ordered that a discontinuance should be forthwith filed by the plaintiff's attorney, or in the alternative that all further proceedings on the part of the plaintiff should be stayed in view of the settlement.

We have looked at the cases cited at the argument and to be found in the text books on the staying of proceedings, and find nothing resembling this case. The cases of oppressive and vexatious actions, of actions brought or prosecuted against faith, or against parties enjoying immunity by common law or statute, have but a remote analogy to it.

Besides, without questioning the good faith of the agreement, there may be facts in the case which render it a proper subject for inquiry on the Equity side of this Court, in which case we ought not to interfere with the plaintiff's common law right to a rule for judgment and the entry thereof. See *Archbold's Practice*, 1381, and two cases of *Best* v. *Argles*, 3 Dowl., 701, and *Vanderstegen* v. *William*, 6 M. & W., 457.

We discharge, therefore, the rule *nisi* and will stay execution on the judgment for thirty days from this date, that the defendants may take such steps as they may be advised.

THE QUEEN *v.* McKENZIE.

During the pendency of a *certiorari* to remove a conviction of the defendant for selling intoxicating liquors contrary to law, defendant was again convicted and fined $22.80, inclusive of costs, which was reduced below $20 by a part payment, and action was brought in the County Court for the balance on a bond conditioned that defendant would not sell during the pendency of the appeal from the first conviction. There was no evidence that he had sold liquor personally, but it appeared that liquor had been sold on the premises by a woman who was not shewn to be defendant's wife, child, or servant.

***Held*, that the breach of the condition of the bond had not been proved.**

Q. Whether even a sale proved to have been made by a wife, child or servant would be a breach of the condition.

THIS was an action on a bond given by the defendant on issuing a *certiorari* to bring up a conviction for selling intoxicating liquors contrary to law. The bond was conditioned that the defendant would not sell during the pendency "of the appeal." During the pendency of the *certiorari* the defendant was convicted of violating the License Laws, and was fined $22.80, (inclusive of costs.) Part of the fine was paid, reducing the amount due below $20, and this action was brought in the County Court against the bondsmen for the balance. The learned Judge of the County Court considered that he had no jurisdiction, and an appeal was taken from his decision.

Graham, for appellant.—The penalty was for $22.80. This gives the Judge jurisdiction. The judgment must be for the amount of the penalty. In *Bath* v. *Dennison*, 3 R. & C., 303, it was held that the County Court had no jurisdiction where the penalty was in an amount exceeding the jurisdiction, although less was actually due. The penalty having been fixed at an amount that gives the Court jurisdiction, payment of part is no answer. (McDONALD, J.—Suppose the whole was paid?) That would be a good defence. (McDONALD, J.—Then would not a part payment be a good defence to part?) No. In that case judgment must be given for the whole amount. The breach of the conditions of the bond was the sale of liquor during the pendency of the appeal. As to plea of payment, see *Bullen & Leake*, 544, 545. A plea of payment of part on a bond is bad. Another principle gives the Court jurisdiction. The Crown has the power of going into any Court. It was not necessary that it should appear who authorized the prosecution.

Sedgewick, contra.—The practice, as I understand, is for the jury to find for the full amount of the penalty and costs, and at the same time the jury assess the damages at the amount actually sustained; *B. & L.*, 45. The statute of 1877, chapter 6, section 6, changing the jurisdiction, provides that the amount shall not be less than twenty dollars. It is a pure question of construction. The statute here says that the damages give the jurisdiction. In England the proper course would be to enter judgment for the amount of the bond and award execution for the damages assessed. This action is brought to recover damages arising from the breach of the contract. Next to the question of jurisdiction is the question whether they have proved a breach of the License Law. The form of the appeal bond here is essentially different from that given by the statute. There are words imported into it that are not in the form. (McDONALD, J.—It is necessary that there should be.) It is a material divergence. If they cannot recover on the form in the statute, they cannot recover at all. Proceedings by *certiorari* are not an appeal at all. The bond provided that liquor should not be sold during the pendency of the appeal. It is clear that there was no appeal. Assuming that there was an appeal, there is no evidence of a breach.

This is an action of debt, and the proof of the sale must be different from a prosecution for the sale of liquor in the ordinary way. It must be the personal act of the party charged. Even in an ordinary prosecution it would have to be proved that the sale by some one else than the master was by a wife, child or servant. It could not be presumed. We are entitled to know by whom the proceedings are taken. Applicants cannot go on without stating for whom they are acting.

Graham, in reply, cites chapter 18 of the Acts of 1874, section 20. That is a statutable judgment which the Judge has given in this case. *In Re Fraser*, (ante, p. 354,) establishes that this is a civil proceeding. If so, the person on the premises selling and having the appearance of authority makes the defendant liable. I don't rely on the statute but on the ordinary principle. The violation of the bond is during the pendency of this proceeding. The question as to this not being a statutable bond does not arise. There being no plea of payment on the record, the Court would have jurisdiction. A plea of payment of part is no answer; *9 Exch.*, 490; *1 Chitty's Statutes*, 422; *Broom's Legal Maxims*, 72, as to prosecutions by the Crown. The statute of Anne does not apply to the Queen as it does not expressly mention her.

Sedgewick.—There is no allegation in the writ that any fines were incurred, or appeal prosecuted, or *certiorari* issued, or final order made, all of which are absolutely necessary.

McDONALD, J., now, (May 7, 1880,) delivered the judgment of the Court:—

I think that the judgment appealed from in this cause, must be upheld. The plaintiff should prove the breaches of the condition of the bond relied upon, but here, he has not proved any. The main contention on the part of the plaintiff, was that the defendant, during the pendency of the suit, removed by *certiorari* to this Court, had violated the provisions of the act respecting the sale of intoxicating liquors, by selling such liquors without license. There was not a tittle of evidence that he sold liquors personally, but it appeared that some woman did so in the hotel of which he is proprietor, and the learned Counsel for the plaintiff argues that, under sec. 32 of Chap. 75 of the Rev. Statutes, such sale constituted a breach

of the condition of the bond. That section provides that "any sale of intoxicating liquors made on the premises of any person, by the wife, child or servant of such person, shall be considered, presumptively, as the act of the husband, parent or master, and shall be punished in the same way as if such sale had been made by such husband, parent or master in person, and the burthen of proof of innocence shall be thrown on such husband, parent or master."

There is no evidence whatever that the person who in this case sold the liquor was either the wife, child, or servant of the defendant. If there were any such evidence, and if this had been an action, not upon this bond, but in the ordinary way to recover the penalty fixed by the statute for the first, second, third or subsequent offence, it would be competent for the defendant to show that, notwithstanding the fact that the person who sold the liquor upon his premises, was his wife, child, or servant, yet such person sold without his authority, and in that way he could defend the cause successfully. But, in this case, even if it were proved that the sale was by the defendant's wife, child, or servant, it is very questionable whether such sale would be a breach of the condition of the bond which provides that the defendant, (not his wife child or servant,) shall not violate any provisions of the law respecting the sale of intoxicating liquors, &c.

The bond upon which this action is brought, is decidedly defective, and not at all in accordance with the intention of the statute. With sec. 12 of Chap. 1 of the Rev. Statutes for guidance, there was no difficulty whatever in drawing a bond which would be sufficient for all the purposes of this case, but, as it is, it is quite impossible to maintain this action. The breach relied upon is, that the defendant did, during the pendency of an appeal under *certiorari*, violate some provision of the law respecting the sale of intoxicating liquors, but it is difficult to say what period of time that was.

Mr. Sedgewick took several other objections on behalf of the defendant, most of which present much difficulty in the plaintiff's way; but, as the case stands, it is not necessary to decide them now.

Mr. Graham objected that the learned Judge of the County Court, gave his judgment as in case of nonsuit, while the

Queen cannot be nonsuited, and I think that the learned Judge did not use the words which would most correctly express the real ground of decision,—which was that he had no jurisdiction in the case. The fact that the Queen is plaintiff will not confer jurisdiction upon a Court constituted as the County Court is, under a statute which provides that such Court shall have no jurisdiction in the particular class of cases which includes the one under consideration; and it is clear that the learned Judge's decision was based upon what he held to be law—that he had no jurisdiction in this case. I think that the defendant is entitled to our judgment.

STEVENS *v.* BRUNT.

VERDICT for plaintiff in action of trespass sustained on the evidence.

THIS was an action of trespass tried before MCDONALD, J., in which a verdict was found for plaintiff, with one dollar damages. A rule was taken to set the verdict aside chiefly as against evidence.

McCoy, Q. C., for defendant cited *5 Allen*, 59; *2 Waterman on Trespass*, 8, 9; *2 M. & W.*, 326, 328; *Cunard* v. *Irving*, James' Reps., 34; *2 Thomson Reps.*, 208; *1 Hilliard on Torts*, 625 *n.*, 602; *8 Mass.*, 415; *2 Greanleaf on Ev.*, 618.

Sedgewick contra.

DESBARRES, J., now (May 7th 1880,) delivered the judgment of the Court:—

This action is brought against the defendant for breaking upon and cutting down and removing trees from the land of the plaintiff, situate near Harrietsfield, in the County of Halifax, described as being in the rear of, and forming part of lot No. 6, in Lieblin Manor, so called, and lying between the road leading from Harrietsfield and what is called the Thomas road in Spryfield, it being a small piece of land at the junction of the two roads. The plaintiff claims the land in question as the devisee of her deceased mother, who was the only daughter of Anthony Henry, deceased, and inherited all his real estate.

In order to establish the title of said Anthony Henry to said land, and in doing so to establish her own, two grants from the Crown were put in evidence on her part at the trial, viz; a grant dated 7th October, 1771, to Augustus Charles Elerhart, of five hundred acres of land, situate beyond the North West Arm, and the other, a grant dated 1st May, 1770, to Albert Leizer, of lot No. 6, also containing 500 acres in the Township of Halifax. Elerhart and wife, on the 27th September, 1780, conveyed to John Trider the same tract of land thus granted to him, and Trider and wife, on the 25th March, 1793, conveyed to George McIntosh lot number two in Harrietsfield, containing thirty acres, and lot No. 7 in Spryfield, containing five hundred acres. On the 26th March, 1793, George McIntosh and wife conveyed to said Anthony Henry lot No. 2, containing 30 acres, and parts of lots Nos. 6 and 7, being all the land lying between the road leading from off Harrietsfield to Thomas's road. No deed was offered in evidence from Leizer, the grantee of lot No. 6 to McIntosh, who conveyed that lot to said Anthony Henry, but there is a deed from Leizer to one Conrod Paw, dated 13th November, 1780, of said lot No. 6, containing five hundred acres, which invalidates the deed as to that lot from said George McIntosh to said Anthony Henry, and necessarily affects the plaintiff's title thereto unless it can be strengthened by a continuous possession under color of title for a period of twenty years, which I think would make it good. With the exception of this defect there appears to be evidence of a documentary title in said Anthony Henry in his life time of all the land now claimed by the plaintiff under her mothers will. Let us consider whether there is evidence of possession to cure the apparent defect in the plaintiff's title to No. 6. It appears from the evidence that the said Anthony Henry, the grandfather of the plaintiff, died in the year 1800, leaving his only daughter Henrietta Elizabeth Henry him surviving, who, in 1802, was married to William Roxby, the father of the plaintiff. Roxby died in 1817, and Henrietta Elizabeth, his wife, died in 1843. There was therefore a possession first of all in Anthony Henry under the deed to him from George McIntosh, of lots Nos. 6 and 7, together with his other lands, for seven years, then a possession in William Roxby and his wife for sixteen years, then a possession in

Henrietta Elizabeth Roxby alone, the mother of the plaintiff for twenty six years, then a possession in the plaintiff herself, while sole and unmarried, for two years, and last of all a possion in William Stevens to whom she was married in 1845, from that time until 1875 when he died, making altogether a continuous and unbroken possession of eighty-one years up to within four years before the trial, when it appears defendant entered upon the land and committed the trespasses complained of. William Stevens, the husband of the plaintiff, is proved to have exercised an attentive and strict supervision over the whole of the land to which his wife was entitled, consisting of lots number two, three, four, five and six, at Harrietsfield, and also all the land lying between the road leading from Harrietsfield and Thomas road in Spryfield, being land in the rear of, and forming part of lots Nos. 6 and 7 in Spryfield. The plaintiff having, as I think, established a legal right to maintain this suit, we must in the next place inquire whether there is any evidence to make the defendant chargeable with a trespass on any part of the land described in the writ. On this point there can be no difficulty as William Stevens, the plaintiff's son, proves that the defendant told him he had committed the acts complained of as trespasses on the land decribed as being part of lot No. 6; and Mr. Hendry the Surveyor, speaking from an actual survey of the land and a plan made by him corresponding with his survey, and from his observation of the locality, in his evidence says; "defendant lived on the Eastern side of the Thomson road opposite his buildings. The only improved land there is that in dispute and is the Spryfield lots. I have no doubt, judging from the plan, it is part of lot No. 6; defendant pointed out the clearing to me, claiming it as his." Upon this evidence the learned Judge who tried this cause without a jury, found a verdict for plaintiff for one dollar damages, and we are now to say whether there is sufficient evidence to sustain it, or whether it must be set aside. The defence set up in this suit is that the locus or piece of land in dispute is part of lot number seven, and not part of lot number six as contended for by plaintiff and that he has a legal title to the said piece of land under a deed executed to him by Archibald Kidston and wife, dated 8th November, 1875, who derives his title through a deed executed

by John Smith and Elizabeth Shea as surviving Executor and Executrix of George McIntosh to William Gardner, dated 1st May, 1845, of the Eastern half of lot six and the whole of lot number seven, situate at Spryfield, and also under a deed from Catherine Gardner and others, the widow and surviving children of William Gardner, to George Kidston, dated 26th Feb,, 1864, of lot No. 7 on the South-west side of Hersington road near Spryfield, containing 450 acres, and next under a deed from George Kidston to Archibald Kidston, dated 29th, Nov. 1873, of lots No. 6 and 7, containing 250 acres. It is evident that the deed from the surviving Executor and Executrix of George McIntosh to William Gardner conveyed to him no title, it having been clearly shewn by the deed marked 4 produced in evidence on the part of the plaintiff that George McIntosh and wife on the 26th of March, 1793, conveyed to Anthony Henry, the grandfather of the plaintiff, the very same land, that is to say; all the land between the road leading from Harrietsfield to Thomson's road, being the rear of lot number seven and part of lot number six, within which it has been clearly shewn the piece of land in dispute is situate. The defendant having, as I think, proved no title to this land and offered no available defence to the case made out and established by the plaintiff against him, cannot prevail in his application to set aside the verdict, and the rule *nisi* granted for that purpose must for that reason be discharged with costs.

STEVENS *v.* OVERSEERS OF THE POOR.

PLAINTIFF brought his action in the County Court to recover an amount expended for the support of a female pauper and her illegitimate child, but failed to shew when notice was given and request made to the Overseers. The judgment of the County Court was for defendants.

Held, that the appeal must be disallowed, as there was no evidence of the date of notice, from which the Court could have said how much plaintiff was entitled to recover, but that the costs of opposing the appeal should not be allowed, as the County Court had decided on different and untenable grounds.

Held, also, that the fact of the pauper refusing to make an affidavit as to the paternity of the child, was not sufficient to warrant the Overseers in withholding relief or refusing to reimburse the plaintiff, by whom it had been afforded.

THIS was an action brought by plaintiff for board and lodging supplied by him to Mary Ann McDonald and her illegitimate child, alleged to be paupers chargeable to the Township

of Wallace, tried before W. A. D. MORSE, County Court Judge for Cumberland County. Judgment was in favor of defendants. Plaintiff took out a rule under the statute.

Townshend opens in support of rule. Reads evidence, etc. The Judge puts it as a first ground that she was not a pauper. This is contradicted by the evidence, which shews she had no home and was about to be confined. She was wandering about. Some one had to look after her. She had no property sufficient to support her. The only evidence to the contrary is that she had a five dollar bill. Being a pauper, without means of support, it was the duty of the Township to support her. She knew that the Overseers had been applied to for her support, and still remained. Her sister did not take her in with the idea of maintaining her, but applied to the Overseers, who came. The only reason for refusing relief was that she declined to make the affidavit required as to the paternity of the child. This was no reason for the refusal. Section 18, chapter 33, Revised Statutes.

Meagher, contra.—There is no rule here for appeal. A rule was refused by the Judge, and the rule granted should have been signed by the Court; Acts of 1877, chapter 6, sections 26, 27. There is a distinction between a rule and an order. The practice of the Supreme Court is applicable. It is provided that the Judge shall certify all rules or orders. Cites Revised Statutes chap. 95, sec. 31, as to the practice in Equity. The Township is not liable for the support of a pauper until there is notice and request. The liability only begins when this notice is served. There is no proof when the notice was served. Section 3 of chapter 35 Revised Statutes gives powers to one Overseer, and so in other clauses, but this is conclusive that in cases not excepted one cannot bind the others. Cites, on the question of notice, *5 Q. B.*, 500. The notice said to have been sent is signed by two of the Overseers as individuals. The overseers had no authority to make the contract alleged here. There is no proof that the woman had a settlement in the district, and the board charged for the child is below the jurisdiction. The judgment here is one upon the facts and evidence, and therefore cannot be reviewed.

Rigby, Q. C., in reply.—In the County Court Act the words "Court" and "Judge" and "rule" and "order" are inter-

changeable, as there is but one Judge in the Court. Cites Acts of 1877, chapter 6, section 27, and Acts of 1878, chapter 9, section 14, to shew that the word "order" is used of a rule granted by the Supreme Court, and that the "Judge" can allow an appeal. The rule or order here could not have been signed "by the Court," because there was no Court when it was actually given. Clause 18 of chapter 6, 1877, puts the order of a Judge on a par with the order of the Court.

McDONALD, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

The plaintiff cannot recover in this suit except for expenses necessarily incurred for the relief of the pauper after notice and request made to the Overseers of the Poor of the Township, and until provision made by them, as provided by chapter 33, section 18, Revised Statutes, and it was incumbent upon him to shew when such notice was given, so that the Court could say how much ought to be paid. He has failed to do so, and left us in the dark as to how much he is entitled to recover, or whether or not he has brought the case within the jurisdiction of the County Court; and upon this ground and this alone I think the appeal must be disallowed, but as the case was decided against him in the County Court upon different grounds, which, as I think, cannot be upheld in law, it ought to be without the costs consequent upon an appeal from that decision. It is true that there were some negotiations between the plaintiff and one of the Overseers of the Poor as to the payment of twenty-five dollars in lieu of all claims, but the binding effect of that proposal appears to me, by the plaintiff's own evidence, to depend upon its ratification by the other Overseers, who, when afterwards applied to, refused to agree to it. That the plaintiff is entitled to some compensation is, to my mind, beyond a doubt, but to how much the evidence does not shew. We have only the fact that the notice was served after the birth of the child, but the time is not fixed. Whether the woman had or had not sufficient means of her own to support her, (and I do not believe she had,) she and her child both were in that unfortunate and helpless condition that the Overseers should have made provision for them. If she had means the plaintiff does not appear to have been

aware of it, and she paid him nothing, but if she had property the law enabled the Overseers to repay the Township out of it. The plaintiff afforded the relief which the Overseers ought to have afforded after the notice was given, and although the Justice of the Peace who went to see the woman, at the request of the Overseers, told her sister, with questionable propriety, that he "did not know what to do with her but put her out of doors," the plaintiff very properly declined to act upon the suggestion, for the very good reason that, as Mrs. Stevens said, "she was not in a condition to be put out, she might go to the woods and die." The Justice of the Peace referred to, although he was sworn and gave evidence, does not deny this. If the plaintiff had been a stranger and not a brother-in-law of the unfortunate woman I presume his claim would not have been disputed, but, although the Overseers may have drawn the distinction, the law does not.

I do not at all concur in the opinion that, because the woman refused to make the declaration required in such cases, the Overseers are at liberty to withhold relief or to refuse reimbursing any one who may afford it, after the proper notice is given. Had the suggestion of the Justice of the Peace been acted upon by the plaintiff, the Overseers with a full knowledge of the case refusing to provide for the woman, and had she in consequence died, as Mrs. Stevens said she probably would, I do not think there can be any doubt that they would be liable to be indicted and convicted for the crime, as a crime it certainly would have been. The evidence touching the services said to have been rendered by the woman while in the condition proved, I throw out of the question as entitled to no weight, and the evidence touching conversations of the Overseers and the Justice of the Peace with the pauper and with Mrs. Stevens, in her husband's absence, ought not to have been received, and can have no effect. The witness, Mrs. Reeves, appears to me to have proved too much, but even if what she says be true it cannot affect the case, in the view that I take of it.

I am of opinion that there ought to be a judgment of nonsuit without the costs of opposing the appeal. By the Act of 1876 it is not necessary that five Overseers of the Poor should be appointed. Three are sufficient.

WEATHERBE, J., delivered the following opinion :—

In this case the plaintiff, a laboring man with a family, contributed to the support of one Mary Ann McDonald, his wife's sister, during her confinement and delivery of a bastard child. He made a claim for over twenty weeks' support,—$44,—upon the township, and after some dispute and negotiation he settled with one of the Overseers for $25, though the evidence is not clear respecting an alleged agreement by defendant to pay this sum. The only objection which the Overseers make to the payment of this claim seems to be that the pauper refused to disclose the name of the father of the the child, and, in a notice to plaintiff, in writing, they admit the township is liable for the maintenance of the pauper and offer to take measures for her support, provided she discloses the father's name.

The learned Judge below says; "In such a case as this, where the woman declines the aid of the town and refuses to reveal the name of the father of the child in order that the Overseers of the Poor may cause such orders to be passed as may indemnify the town for the charges of keeping, &c., I doubted if the town could be held liable, and so decided."

The learned Judge seems to have thought the case would have been different respecting the disclosure of the father if the pauper had been a lunatic, on the ground, I suppose, of incapacity to disclose, and he decides that she was perfectly sane. It is obvious that a sane pauper may not be in a position to disclose. I think it is not a condition of the obtaining of relief for a pauper depending, in confinement, for support on the township, that she should disclose the father of her bastard child. There is nothing in the law requiring such disclosure as a condition, and I think we cannot engraft this proviso upon a humane statute where there is, so far as I am aware, nothing whatever to indicate an intention of the Legislature so to trammel the law providing for the relief of paupers. The learned Judge has not informed us whether he would, (if he held a different view on the point now disposed of,) still have disallowed the claim. He seems to be of opinion that because the pauper had a trifling sum of money, the existence of which she did not, it appears, at first disclose

to plaintiff or his family, she could not be made chargeable. A person may be chargeable though he may have ample means, provided neither the claimant nor the township is aware of it, and I could understand a deduction in favor of defendants of any sums disbursed in the family out of any funds in the hands of the pauper. Our statute provides for the recovery of sums paid for relief of paupers where they are discovered with means to pay, by empowering the Overseers to sue the pauper afterwards for money expended for his relief. I cannot agree with the view that because the alleged pauper did not wish and even refused the aid of the town, that plaintiff should not recover. Though a destitute person might rather die than accept aid, the duty and obligation is none the less to afford it.

The learned Judge thinks, to use his language, that this was an attempt to "trump up a bill" against the township. The point to have decided was whether the defendants agreed to pay it; and this is not dealt with. I see nothing in the evidence to explain such a finding, though intelligent persons might differ as to the reasonableness of the charges. It seems to me that since the agreement of one Overseer to pay is not denied, and since two of them seem to have refused aid, without denying their liability, solely on the ground of refusal to disclose the father of the child, which we all think was wrong, the case should again be referred to the learned Judge, in order that his opinion might be obtained respecting the plaintiff's agreement with the Overseers or the amount expended by him.

MUNRO *v.* OVERSEERS OF THE POOR, WALLACE.

PLAINTIFF claimed under an agreement made by one of the Overseers of Poor who had been deputed by the other Overseers to attend to the request of the plaintiff's father, claiming to be a pauper, who required medicine and attendance in his last illness. It appeared that plaintiff was a person of no means whatever, but that one of the pauper's other sons, after the contract was made with plaintiff, notified the Overseers of his willingness to support his father at his house, but at the time said notice was given the pauper was not in a condition to be removed.

Held, that defendants, the successors of the Overseers who had dealt with the matter in the first instance, were liable under the contract, although the Town Meeting had declined to vote a sum to meet the charge, their remedy being by amercement of the Township.

Semble, that, apart from the contract, the Overseers would be liable, under Revised Statutes, chapter 33, for attendance furnished by the plaintiff, being a person not liable by law for the pauper's support, as he was not of sufficient ability to relieve and maintain him at his own charge; and no direction had been given by the Sessions that he should do so. (Sections 11, 18).

THIS was an action against the Overseers of the Poor for the township of Wallace for attendance on a pauper supplied at the request of the Overseers. A new set of Overseers having come in declined to pay. The action was brought in the County Court, where judgment was given for defendants, from which the plaintiff appealed.

Townshend for appellant.—I conceive the decision is fallacious and contrary to law. It is based on several grounds. The Judge's first mistake is in undertaking himself to decide whether the man is a pauper. That is a question solely for the Overseers. The whole aim in the country is to exclude persons from claims on the town. He should have enquired whether the overseers had decided that the man was a pauper. Under the English law it is settled by an order from a justice, while here it is left to the Overseer. That is Marshall's view of the law in Nova Scotia; *Marshall's Justice*, page 360. I don't mean to go so far as to say that if the Overseers acted fraudulently they could make the township liable. But here there was no such contention, and it was not pretended that they acted otherwise than in good faith. Flinn swears that he was appointed by the other Overseers to go and see the pauper with the view of having him removed; that he found him helpless and incapable of being removed, and that having arranged for taking care of him he reported to the other Overseers, who appeared to be satisfied.

The fact of property was not one for the Judge, and the Overseers cannot be required to investigate it before affording relief, as, in the meantime, the pauper may die. They have

another remedy under *R.S.*, chap. 33, sec. 39. The provision here is intended to meet just such a case as this. It is no ground of defence that the pauper had relatives of sufficient ability to support him. *R. S.*, chap. 33, sec. 11, provides the manner in which relatives may be called upon. An order of the Sessions is required. The remaining ground on which the decision is based consists of statements of the plaintiff which should not have been received in evidence, and are no ground unless they amount to a release of the action. The Judge, unintentionally, has mis-stated the evidence.

It is the duty of Overseers to afford relief. The policy of the law is to compel Overseers to do this and to protect them in doing it. It is uncontradicted that plaintiff performed these services for a man who was treated as a pauper by the Overseers, and, as there is no question as to the reasonableness of the charge we should recover. The question whether, if we get a judgment, we can recover, is of no consequence, and is no reason for refusing a judgment.

Meagher contra.—The question is whether the man was a pauper. If not the Overseers had no authority to make a contract binding on the township. The evidence shows that the man was not a pauper, and the Judge has so found it. The Overseers were notified by a son of the pauper that he was able and willing to support his father. The contract is not proved. There was no authority to make it. If made it was not binding. There is no evidence that the father was in want of anything.

If the Court could not try the question whether the man was a pauper the Overseers would not be amenable to law. The whole right to make the contract depended upon this question. Reed's evidence shows that twenty tons hay were cut off the land of which the pauper held a life lease. Hay that year was yielding $8 per ton. There is nothing in the act to authorize the assessment on the township for the support of a man capable of supporting himself.

The plaintiff has not accounted for the money received from the sale of the hay in the year when his father died. (*Townshend.*—He swears he paid the money to his mother for his father's support.) The plaintiff, who was one of the parties liable for his father's support, cannot recover against

the township; *Burrill* v. *Hatfield*, 2 Thomson's Reps., 161. There is no evidence of an agreement on the part of the Overseers, except that they asked one of their number to look after the father, and he came back and reported to them, and they made no objection. Section 11 of chapter 33 is merely directory. The relatives would be liable, under that section, to an action at law. The revenue from the lot was not shown, and the plaintiff to succeed was bound to show it. The Sessions could not declare the father a pauper while he had this property. Recurring to section 11, a man may be a pauper even though that step is not taken. It may or may not be invoked.

The present Overseers are not liable for the acts of their predecessors.

The question was one of fact, and as there is evidence to sustain the finding of the Judge below it will not be disturbed. If the discretion of the Overseers is uncontrolled they can even make a pauper of a man against his will.

Rigby, Q. C., in reply.—This is an action for services performed under a contract with a corporation; *R. S.*, chap. 53, sec. 15. Contracts within the scope of the powers of a corporation need not to be authenticated by a seal. It was the same at common law and did not require a statute. The man applied for relief as a pauper, and they decided he was a pauper, as they had power to do. The County Court Judge has undertaken to assume that the sum which the father might receive if his property were judiciously managed would be enough for his support. It is not the policy of the law that these nice distinctions should be made.

WEATHERBE, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

The plaintiff was a laborer possessed of no real or personal property. His father, John Munro, an old man, was lying ill at the house of another son, Hugh Munro, helpless and dying, requiring medical aid and watching and attendance every day. Application was made to the Overseers of the Poor, who selected one of their number to attend to the matter. He, having obtained legal advice, hired the plaintiff to take care

of the father, and reported what he had done to the other Overseers, who made no objection. He says; "We considered him, (the father,) a town charge." The pauper required constant attendance, and for this service one dollar per day, for night and day, is charged, which the Overseer swears is reasonable. There are other charges for expenditures besides. These facts are not, I think, disputed. The learned Judge below, in remarking on this, and referring to the Overseer, says he visited the pauper at Hugh's house and told plaintiff to look after him and take care of him, and he would see him paid. It was not, I think, contended that this was not authorized at the instance and with the sanction of the other Overseers. This case seems to me to be free from much difficulty, and the defendants appear, I cannot help thinking, to be without a valid defence to the action. It was said that plaintiff, being a son of the pauper, a claim of this kind is regarded in law with disfavor, and a passage from *Lilly's Abridgement* was relied on, shewing that where the father of children left the parish, the grandfather was chargeable with their support. Even if this claim was not founded on a distinct agreement between plaintiff and defendants our statute would, I think, apply. The statute, (section 18,) says that the Township shall be liable for any expense necessarily incurred for the relief of a pauper by *any* person who is not liable by law for his support, upon notice being given. Where the *Sessions direct* it, (see section 11,) the children of an aged pauper, *being of sufficient ability*, shall contribute towards the maintenance of the pauper, under a penalty of one dollar per week, to be sued as a debt. There does not appear to have been an order of the Sessions here, and it is not contended that plaintiff was of sufficient ability. He had nothing whatever, and, even if he had not been acting under instructions from the Overseer, upon notice to the Overseers his claim would come, I should suppose, within section 18.

One ground of appeal was that there was a distinct finding by the Court below that John Munro was not a pauper. A misapprehension seems to have existed on that point. An estimate is made of a pension to which the pauper was entitled of twenty dollars and some hay under an annual lease down to the year previous to that when the liability now discussed arose.

It was inferred that, as he for some years had been in the receipt of about one hundred dollars annually, and might have been entitled to it the year in question, therefore the pauper was held to be deprived of the right of demanding aid from the town. It is admitted there is no evidence that at the time of the emergency which induced the visit of the Overseer to the pauper there was any part of this alleged income available, or that there would be for that year, and I think it ought to be understood that this Court could not sanction an estimate of this kind as the standard upon which relief is to be administered or refused to those to whom the law, from considerations of humanity, has given the right of relief from the Township. If any of the sons were liable, if there were goods or choses in action to be pursued, but not immediately available, the property of the pauper, the statute points out how the Overseers are to reimburse themselves. The Overseer in this case, I think upon the evidence sent to us, did nothing more than his duty.

It was contended on the argument that plaintiff should not recover because Murdoch Munro, another son, was willing to support the father. This was a subject for the consideration of the Overseers, and for them alone, at the time they were called on. It is no answer whatever to this claim. I may remark, however, that it is in evidence that plaintiff was not aware of such an offer. The acting Overseer very properly made the proposal of removal to the old man, who replied that Murdoch did not treat him well, and this, even if the old man's fears were groundless, and he was fit to be removed,—which, however, he was not,—was a matter entirely for the discretion of the Overseers, I think,—a discretion which one could hope would ever be discreetly exercised. I think in this case the urgency for aid, where the pauper lay in his last illness, is very similar to a case of accident, and on the question of removal the case of *Tomlinson* v. *Bentall*, 5 B. & C., 744, seems to me pertinent. Immediate relief was there invoked in consequence of an accident on the road to a poor woman who broke her thigh. There had been delay in providing relief, and eventually she was removed some distance to her own house, out of the parish where she was injured. She was treated as a pauper, and BAYLEY, J., said; "I think it highly prejudicial to the rights of the poor that when an accident has happened the

question should be agitated or even pass in the minds of those persons in whose power the sufferer is of necessity placed, whether a burden which must fall somewhere must be borne by them, or can by any contrivance be shifted to others. It is of importance, therefore, that it should be certain upon whom the obligation to provide medical attendance rests, for otherwise the consequence will be that poor persons who ought not to be removed from the place where they have met with an accident will, perhaps at the risk of their life, but certainly with great aggravation to their sufferings, be removed to a distance."

It was not denied on the argument that the pauper was too ill for removal, and I could not understand whether it was contended by counsel that at the time of the visit of the Overseer he should, notwithstanding, have ordered the removal and refused aid. If Murdoch, who appears to have been the only son of sufficient ability, knowing of the danger of removal, had been willing to furnish the aid to the pauper where he lay, the Overseer should not, of course, have contracted a charge against the Township, but this does not by any means appear to have been the case.

We are not to understand that the judgment below turned on the question of a fraudulent claim because improper feeling between the brothers entered into the matter. Although mention is made of an assertion on plaintiff's part that he wished to make his brother Murdoch liable, I think we are not to suppose the learned Judge puts his judgment on the ground that there was collusion between the pauper, the plaintiff and the Overseers, or one of them. He, in fact, puts it on different grounds, and on what we all conceive to be a misapprehension on several points of importance.

Plaintiff's counsel below took the ground that the question there at issue was not whether John Munro had sufficient property to support him but whether the Overseers had employed the plaintiff, and the learned Judge, to meet this argument, says; "I have to say to this proposition, the town is only liable for its poor, and the Overseers can only render it liable for such." He adds; "If John Munro with his life lease and his pension and a son anxious and willing

and desirous to maintain him, and while living in another son's house and having resided there for years without aid from the town, was a fit subject for poor relief, it would be difficult to say in the future who is not, or who is to prevent the township from being burdened and the poor houses from being filled."

Now although this appears to be all immaterial, according to our view, here where there is an issue of a distinct agreement between plaintiff and the defendant corporation, yet to prevent any misunderstanding respecting the protection to which the poor are entitled, it seems proper to point out that, even when the matter was under the consideration of the Overseer, the pension and the life lease, the son anxious to support the father, and the residence with another son must all properly count for nothing if the pension was not due and there were no available returns from the lease, if the father could not be removed, or, in view of the Overseer, apprehended cruelty from one son while the other was poor and in debt and unable to furnish the proper attendance and medical aid.

It was said the town was only liable for its poor; but who are the poor? No cases were cited to us. In *Sturbridge* v. *Holland*, 11 Pick., 459, it was held that a necessity for immediate relief constituted a pauper. And a person old, infirm and unable to labor, who had, however, a pension of $96 *per annum*, one half of which was available, the other half being required to pay up arrearages for board, was held a pauper in *Fisk* v. *Lincoln*, 19 Pick., 473.

There was no evidence, so far as I can understand, that the pauper in this case had any available means whatever.

Then it was urged before us, that even if the pauper was chargeable, the present Overseers were not liable, because the town meeting had since declined to vote a sum, and a judgment, it was argued, against the Overseers, would be useless, and that the plaintiff here should have proceeded to amerce the inhabitants. But this we cannot hold; the statute distinctly provides that the amercement is to take place upon the application of the Overseers of the Poor, and judgment

once being found against them in their corporate capacity, the remedy by the Overseers is clear.

The appeal, I think, should be allowed, with costs.

McDONALD, J., delivered the following opinion :—

This suit does not reflect much credit upon some, at least, of the parties to it. Old John Munro, the plaintiff's father, was eighty-seven years old when he was taken ill at the house of his son Hugh, and required aid and personal attendance by day and by night. There is no question as to his settlement being in the township of Wallace, and on the 13th of August, 1877, he notified the Overseers that he was eighty-seven years of age, unable to work or make a living, that he had paid poor and county rates for over sixty years, and he claimed the protection of the township, etc. On the same day Hugh Munro, the son in whose house the old man lived, notified the Overseers that his father was unable to support himself, and, further, that they should remove him immediately; adding that he would not keep him for six dollars per week from that date. The plaintiff, another son, who was a mere labourer, owning no property, real or personal, says that on the 26th of August he gave up his "labouring" to attend his father. He says that after the notice referred to, Flynn, who was one of the Overseers of the Poor at the time, came over to see his father, and said to him, (the plaintiff,) "Willie, you look after this man and take care of him, and I will see you paid." He says that his father could not turn without assistance, and it appears that the attendance, etc., charged for during the illness of the old man were necessary. Flynn, who appears to have been acting Overseer, received a notice from a magistrate the contents of which do not clearly appear as the notice was lost, but from what followed we may fairly assume that it related to his duty as one of the Overseers of the Poor. He then, as he says, got legal advice on the subject, and, as the result, consulted the other Overseers. He says; "They selected me to go; I went over and saw how he was with the idea of removing him; finding him unable to be removed I hired his son William to take care of him; found him lying in bed quite helpless; I sought medical advice; I reported what I had done to the other Overseers; they made no objection and appeared

to be satisfied; we then all considered him a town charge." He further says that he does not think $1.00 a day and night is out of the way, by which I suppose he means the charge made by the plaintiff for his attendance.

With this narrative of the transaction, given on the part of the plaintiff under his own oath and that of one of the Overseers of the Poor deputed by the other Overseers to attend to the business, and not contradicted by any one, but showing that the pauper was unable to provide for himself, that the liabitity of the township was recognized by the Overseers, one of whom actually engaged the plaintiff to do the work charged for, after having been deputed by the others to attend to the business, and whose acts, after having been reported to them afterwards, appear to have been approved of by all of them, one finds it very difficult to see any justification for the Overseers repudiating their liability, or rather the liability of the township, under the agreement referred to.

I must confess, however, that in my opinion the conduct of the two sons, Hugh and Murdoch, who appear to have had some means, does not reflect much credit upon them; but the evidence which reveals their unfeeling conduct towards their father is no evidence which can legally affect the plaintiff's case as it is presented to us. He had no means whatever and left the service in which he was engaged to attend upon his father, though he would have been a pauper himself if he were not able to work for his living.

It appears that before the transactions in dispute the father conveyed his real property,—300 acres of land,—to Hugh and Murdoch, receiving back from the latter a life lease of one-third adjoining Hugh's land. There does not appear to have existed a very brotherly feeling between the two brothers just named, and on the first day of September, 1877, while the plaintiff was attending the father, of whose estate he does not appear to have received any part, Murdoch notified Hugh that he would support his father for the produce of the land which was set apart for him,—meaning the land mentioned in the life lease,—and that he would relieve the Overseers of the Poor. He at the same time notified the Overseers of the Poor, without mentioning any condition as to receiving the

produce of the land, that he was prepared to support his father, either in his own house or in any other suitable place, and would hold the Overseers responsible for any damage or loss he, (Murdoch,) might sustain in consequence of not removing him from where he then was. At first sight it seems difficult to understand the object of this notice, but it appears to me quite evident that he anticipated being called upon to pay over to the Overseers of the Poor the weekly sums mentioned in section 11 of chapter 33, *R. S.* That section provides that "the father, grandfather, mother, grandmother, children and grandchildren respectively of every old, blind, lame, impotent, or other poor person, not able to work, being of sufficient ability, shall relieve and maintain, at their own expense, every such person, as a general or special Sessions shall direct, and in case of refusal shall forfeit one dollar per week for such poor person to be sued for in the name of the Overseers of the Poor." Although it would seem that Murdoch thought that, as son of John Munro, he might be called upon to pay under the section just cited, we were told at the argument that the meaning of that section was entirely in favour of the defendants and a complete answer to this suit, because, as it was urged, the sons were thereby rendered liable for the support of the father, though there was no order of the Sessions showing that they were of sufficient ability to support him, or directing that they, or any of them, should maintain him. But can it be supposed that the Legislature would have given the Overseers of the Poor the right to sue the sons, except as a means of repaying to the township the amount by them expended in relieving the pauper? Or can it be contended that the Overseers are at liberty to allow a pauper to die for want of relief because he has a cruel son who, though of sufficient ability, refuses relief to his parent till compelled by law to pay the Overseers, and that they still have the right to recover the forfeiture, though neither made any advances for the relief of the pauper? Certainly not. And yet the argument addressed to us on this point goes for nothing if it does not go to that extent. If an Overseer does not provide for the poor he is indictable; *4 Burn*, 28, 131. But the statute has provided that the Court of Sessions, not the County Court or this Court, should be the tribunal to decide upon the

ability of the next of kin and his liability to support the particular pauper in question.

Some stress was laid upon the fact that, after the old man conveyed his real estate to Murdoch and Hugh, he gave the plaintiff a power of attorney to transact his business generally, and that fact was relied upon at the argument to defeat the plaintiff's claim; but, in the face of the evidence that he had no funds or means of the pauper in his hands at the time of rendering the services in question, and there being no fraud against the defendants, the objection cannot prevail. It is further argued that, because the father had a life lease of a hundred acres of land, the value of which is very doubtful, he was not a township charge; but I must confess I do not see the force of that argument. One may have property, and large sums of money may be due to him, and yet he may be in such circumstances at the time as to be unable to make them available, in which case it is the clear duty of the Overseers of the Poor to relieve him if he be in actual need. If they should knowingly refuse to do so and if, in consequence, death should ensue, they would be clearly liable to punishment. Section 39 clearly sustains this view, as it provides that, in such case, the Overseers may make the property of the person receiving aid available to repay the township; and in order that they may have funds in their hands for relieving distress whenever it exists in the township, section 35 provides for the amercement of the township if the inhabitants fail to make adequate provision for the support of the poor.

The learned counsel for the defendants attached some importance to the fact that Murdoch Munro served a notice on Hugh offering to take the pauper off his hands on a certain condition, and another upon the Overseers as already mentioned; but clearly these notices cannot have the slightest effect as against the plaintiff who was no party to them. He claims under his contract with the defendants, and the unseemly and unfeeling conduct of the two sons who got the father's property ought not to and cannot affect the plaintiff's right under his contract with the Overseers. It is affirmed by two witnesses and entirely uncontradicted, that just before the time that Murdoch in his notice to the Overseers threatened to hold them responsible for any loss or damage he might

sustain in consequence of the non-removal of his father, the latter was not in a fit condition to be removed, but this good son Murdoch, while he cautioned the Overseers against damage to himself, does not appear to have considered the damage that might result to his dying father by being removed when he was not in a fit condition for that purpose.

Flynn's conduct has been severely censured but, as I think, without sufficient cause. He acted, when urged to do so, after having taken legal advice, and after consultation with the other Overseers,—personally seeing the condition of the sick man. Persons in his position are appointed to office not for the purpose of protecting the township against all pauper charges, but for the more humane purpose of affording immediate relief whenever it is beyond the power of the pauper himself to obtain it, and not simply when it is beyond the power of a son or any other next of kin to afford it. The law makes ample provision for reimbursing them on behalf of the township for their outlay, and it would be well in many cases, if the object of their appointment were better appreciated by them.

But the real question here is not whether the condition of John Munro was such as to justify the Overseers in refusing to treat him as a pauper at all or not. They did so recognize him, sought medical aid for him, and engaged the plaintiff to perform the services for which he charges, promising to see him paid, and I have not the shadow of a doubt that in the discharge of their duty, and under our statute, they did right. Without that the plaintiff could not recover, and as he performed his part of the agreement without practising any fraud or deception upon the Overseers, I think that he is clearly entitled to our judgment, and that the appeal from the judgment below, which was in favour of the defendants, must be allowed.

COGSWELL *v.* O'CONNOR.

DEFENDANT agreed to purchase from one B. a lot of land subject to a mortgage of $6000, executed by B. and wife to plaintiff, and a second mortgage to other parties, paying off the second mortgage and executing a new mortgage to the plaintiff in lieu of the mortgage from B. and wife. The defendant's wife refused to execute the proposed mortgage to plaintiff, and it was signed and sealed by the defendant and placed, together with a bond for the amount, in the hands of defendant's solicitor, to be delivered to plaintiff so soon as the mortgage given by B. was released and the new mortgage by defendant was signed by his wife. The documents afterwards came into the possession of the plaintiff, but defendant's solicitor stated that he had never been authorized to deliver them on any other terms than those mentioned, and he could not recollect when, how, or where plaintiff's solicitor had got them. The original mortgage made by B. and wife was foreclosed and the land bought in, for less than the amount of the mortgage, by the plaintiff, who then brought his action on the covenant for payment in defendant's mortgage, with a count on the bond. Plaintiff on the trial produced his documents, and defendant was not examined to rebut the presumption of delivery. The learned Judge directed a nonsuit

Held, that there was no evidence to go to a jury of a delivery of the documents declared on sufficient to make them operative as deeds, they having been delivered in the first instance as escrows.

JAMES, J., dissenting, held that the fact of the documents being in possession of plaintiff was presumptive proof of their delivery as deeds, and the burden was upon defendant to shew that they had never been delivered as such.

THIS was a re-argument of the case reported in *2 R. & C.*, 287, where the facts of the case are fully set out. The Court was equally divided on the first argument, and the case came on for argument this Term before SIR W. YOUNG, C. J., DESBARRES, MCDONALD, SMITH and JAMES, J J.

Gray, in support of rule to set aside nonsuit.—My first point is that the evidence negatives the idea of an escrow. If that is an answer it is incumbent on the party alleging it to shew it. The evidence shews that there is no escrow. We were in possession in good faith, and the legal presumption is of delivery. The evidence points to a condition of escrow at one time, but the evidence of the same witness, (Mr. Thompson,) shews that there was subsequently a different condition of things. Brehm had become insolvent, and the first arrangement fell through. (JAMES, J.—You agreed to release the old mortgage on receiving the new mortgage; are you not estopped by the fact of your foreclosing the old mortgage from setting up that you have received the new mortgage? YOUNG, C. J. —Mr. Gray, you must have seen that the Court was strongly against you on the merits on the former argument.) The plaintiff is willing and offers to give the defendant the land itself. The second mortgage, with its covenant and the bond, is a declaration of the amount due, and it was what was to

be expected that the plaintiff should receive them from defendant. The evidence is that the negotiations with which Thompson was concerned all fell through. Refers to the case of *Hare* v. *Horton*, cited at the previous argument. Thompson's evidence is that he did not deliver these documents; then either the defendant delivered them, or we came by them through fraud.

Bligh, contra.—My argument will be brief, the ground having all been gone over before. The cases were cited on the former argument, and I need not refer the Court to the decisions of the two Judges who agreed with me on the former argument. Mr. Gray has not opened up any new point whatever beyond those in the former argument. I will only refer to the point as to the conditional delivery. I need not refer to the payment of money by O'Connor, which, if anything, is a mere case of hardship. The forbearance of Cogswell was not the consideration for the delivery. The consideration of the forbearance was the payment of interest. I admit that possession by plaintiff is *prima facie* evidence of delivery. *Hare* v. *Horton* goes that length but no further. In this case there is uncontradicted evidence that the condition was not performed. There were two things to be done before the mortgage was delivered. Mrs. O'Connor was to sign away her dower, and plaintiff was to give a release. Mr. Thompson says the bond and mortgage were not to be delivered until something took place, and that that something did not take place. Mrs. O'Connor was to release her dower, and the plaintiff was to furnish and record the two releases. If the evidence bears that out, there is nothing more to be said. If the question about the trusteeship is eliminated, all difficulty is got over.

Rigby, Q. C., in reply.—On the former argument two Judges held that there was sufficient evidence of delivery, and two others that there was not. (McDONALD, J.—The point was the fulfilment or non-fulfilment of the conditions.) His Lordship the Chief Justice thought the deed was delivered, but that the property having been sold under the mortgage, under an equitable principle, the mortgagee could not recover on the bond. The principle established by the cases is that where the mortgagee has conveyed the property away so as to be unable to place the mortgagor in his original position, he cannot

sue on the bond, but if he buys it in himself, so as to be in a position to re-convey, he can sue on the bond. (YOUNG, C. J.— I will give no further opinion on that point until it is deliberately argued.) The equitable principle does not interfere here, the plaintiff being in a position to re-convey. I admit that if he allows the property to go out of his hands for what it will bring, the equitable principle does come in and prevents his suing on the bond. There is positive authority on that point. (YOUNG, C. J.— Hundreds of properties might be bought in for whatever they would bring, and an action brought on the bond, and sweep off everything the mortgagor has. I would be sorry to assent to that. The English cases do not apply here. We have the Irish procedure.) *Fisher on Mortgage*, (Ed. 1868,) section 603. No objection was offered to the reception of the bond in evidence. This entitled us to recover The defendants say it was never delivered. They should have shewn this by the cross-examining of the witness. The evidence to shew it was an escrow should have been ruled out, the paper having been received without objection. The next question is was there any evidence, *prima facie* or otherwise, to entitle the plaintiff to recover? If so, however weak, he should not have been nonsuited. In this case the bond came from the possession of the plaintiff who held it *bona fide*. *Hare* v. *Horton* shews that possession is *prima facie* evidence of delivery. The defendants say, admitting this, it is rebutted by Mr. Thompson's evidence shewing that he received it as an escrow. But he had it to be executed. He was O'Connor's solicitor. The possession of a solicitor is not the contemplated possession by third person. The fact that Mrs. O'Connor did not sign was immaterial as far as the defendant was concerned. That was not a condition the mortgagor could take advantage of. There was another thing to be done. Brehm had to convey to O'Connor. This he did subsequently, previous to this action. There is no evidence how the documents came into Gray's possession, but there is a presumption that they came there *bona fide*.

DESBARRES, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

This is an action brought on a covenant in a mortgage and upon a bond accompanying the same, alleged to have been

given by the defendant to the plaintiff under circumstances to which I shall presently refer. The case was tried before Mr. Justice McDonald, in November, 1876, and plaintiff, on the recommendation of the learned Judge, submitted to a nonsuit, with leave to move to set it aside. A rule was subsequently granted for that purpose and argued before the full Court, but no judgment was given thereon, in consequence of there being a difference of opinion upon the Bench, necessitating a re-argument, which was lately had in this case.

It appears that the plaintiff, at the time of the execution of the mortgage and bond sued upon, held a mortgage for $6000 on certain lots of land belonging to one Brehm, which he had purchased from the plaintiff. A second mortgage on the same property was also given by Brehm to Messrs. Jennett & Taylor, for $3000. The defendant, being desirous of purchasing the mortgaged property, proposed to Brehm to pay off and obtain a release of the mortgage held by Jennett & Taylor, and then give a new mortgage and bond to the plaintiff on condition that he would accept the same and give a release of the old mortgage he held from Brehm. This proposition was, it seems, assented to by the plaintiff, through his agent, Mr. Gray. The mortgage to Jennett & Taylor, after this arrangement between the defendant, Brehm, and the plaintiff was agreed upon, was accordingly paid by defendant, and a deed from Brehm to defendant of the mortgaged premises was executed, and a mortgage from defendant and his wife to the plaintiff for $6075, together with the usual bond, prepared by Mr. Gray, were then by him sent to the office of Mr. Thompson, the solicitor of defendant, to be executed and delivered to the plaintiff on his releasing the mortgage made to him by Brehm. Both of these documents were signed by the defendant, but the mortgage was not and has never since been signed by the defendant's wife, who, on being requested, refused to do so. No release of Brehm's was, in consequence, ever delivered or offered by the plaintiff to the defendant, and the arrangement made between the respective parties was therefore never perfected or carried out. The plaintiff, probably regarding the negotiation and arrangement as at an end, afterwards foreclosed the mortgage made to him by Brehm, and caused the mortgaged property to be sold, under an order

granted for that purpose, and is now prosecuting the present action against the defendant to recover the difference between the amount for which the property was sold and the sum for which defendant agreed to give him a new mortgage, on receiving a release of the old one made by Brehm. We are therefore to consider whether the evidence produced on the part of the plaintiff at the trial of this cause was such as established a case against the defendant which ought to have been submitted by the learned Judge to the jury as a case upon which they would be warranted in finding for the plaintiff, or whether he was right under the circumstances in directing a nonsuit.

Mr. Thompson, who was called as a witness on the part of the plaintiff, says; "The execution of these papers, (referring to the documents sued upon,) was necessary to the purchaser, and the releases were to be recorded when these were handed to Mr. Gray." Both releases, he thought, were executed in Mr. Gray's office. He was not positive about Cogswell's being executed, though it was ready for execution. Mr. Thompson also states that he was never authorized to deliver the bond placed in his hands on any other terms than he had mentioned. These papers, (the mortgage and bond,) he says, lay in his office a good while. They at length got into the possession of Mr. Gray, but he did not recollect and could not say when, how, or where Mr. Gray got them. It is certain, then, that Mr. Gray did not get them from Mr. Thompson, in whose hands he knew they had been placed as escrows, only to be delivered to the plaintiff on his releasing the mortgage he then held on the property agreed to be sold by Brehm to defendant with his consent. Two things, as we have seen, were to be done before these documents could take effect as deeds. First, the plaintiff was to execute and deliver to the defendant a release of Brehm's mortgage, and next the defendant and his wife were to execute and deliver a new mortgage on the same property to the plaintiff in substitution for the old. Neither of these acts was accomplished, and therefore the documents sued on could not take effect as deeds unless by consent of both parties said acts were absolutely dispensed with and waived. Of this, however, there is no proof. These documents having, by some means or other not explained, found their way to the hands of Mr. Gray, it is contended on the part of

the plaintiff, chiefly on the authority of the case of *Hare* v. *Horton*, 5 B. & Ad., 715, that the mere fact of their being in his possession was *prima facie* evidence that the condition upon which they had been delivered to Mr. Thompson had been complied with. In that case the deed put in evidence was at first delivered as an escrow, yet PARKE, J., says; "Its being afterwards found in plaintiff's possession *was some evidence* that the condition upon which it was so delivered had been complied with," (adding these important words,) "and the defendant should, if it had been in his power, have shewn the contrary." Now, while I admit the soundness of the principle here laid down, I must at the same time observe that there is an essential difference and a striking dissimilarity between the evidence in that case and in this. In that case there was no evidence to rebut the presumption that the condition upon which the deed had been delivered had been complied with arising from the fact of its having been found in plaintiff's possession. In the present case we have it from the mouth of the plaintiff's own witness, Mr. Thompson, and therefore it was unnecessary for the defendant to prove the fact that the arrangement made by the parties was never carried out because the documents referred to were never completed, shewing unmistakably that the condition upon which they were placed in his hands was never complied with. Can it then be said that with such evidence as he had before him it was the duty of the learned Judge to submit this case to the jury, as one upon which they might find a verdict for the plaintiff upon the documents declared upon? I confess I do not think it was.

In *3 Washburne R. P.*, 586, it is laid down, "that if the grantee obtain the possession of the escrow without performance of the condition, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon the compliance with the condition." To hold that there was a delivery of the documents declared upon in this suit sufficient to make them operative as deeds would, in my opinion, be inconsistent with the evidence, and therefore I think that the learned Judge was right in directing a nonsuit in this case, and that the rule *nisi* for setting it aside ought to be discharged with costs.

JAMES, J., delivered the following dissentient opinion :—

I concur fully with the opinion of Mr. Justice WILKINS, on the former argument, and also with that of SIR W. YOUNG, as published, except as to the equitable defence. The whole substance of the defence in this much contested case, although expanded in several pleas, amounts to the plea that the mortgage containing the covenant declared on and the bond declared on are not, either of them, the deed of the defendant. There is a plea that the plaintiff obtained the deeds by fraudulent means, but that is wholly unsustained by the evidence, and was abandoned at the trial. The cause was previously argued, and the report of the opinions of the Judges, who were equally divided, is published in *2 R. & C.*, 289. The deeds declared on are therefore admitted to have come into plaintiff's possession honestly. This being admitted, and no evidence being given explaining how they came into his possession, the presumption of delivery to him is not only a deduction of natural reason, but is a presumption of law as conclusive upon us as if the fact were proved by the most direct testimony that the deeds came into his possession by the delivery of them to him by the defendant or his agent in that behalf. The defendant's solicitor, who had the deeds for some time in his possession, and whose memory does not enable him to state how they went out of his possession, states that he never was authorized by defendant to deliver the papers, and he is satisfied that he did not deliver them to the plaintiff; but he does not say that he did not deliver them to the defendant, and the defendant was not called to shew that he did not. The plaintiff being in possession of the papers, and therefore having the presumption of delivery in his favor, it was incumbent on the defendant to rebut this presumption by going into the witness box and denying that he delivered them. It was not necessary for the plaintiff to do more than rely on the presumption in his favor until it was attacked by evidence, and he had a right to reserve any further evidence in his possession to rebut, in case the defendant should succeed in throwing doubt on the fact of delivery. The fact of Gray not being called, therefore, creates no suspicion, but the fact of the defendant not being called to remove the presumption against him is pregnant with the suspicion that he was not called because his own evidence

must condemn him. I consider, therefore, that we have legal and sufficient evidence of the delivery of the papers by defendant to plaintiff, and, inasmuch as there are no pleas in confession and avoidance, and no equitable pleas, I think I might stop here and intimate my opinion that the nonsuit ought to be set aside because, the plea of fraud being abandoned, there is no other defence to this action on the record, and therefore the plaintiff must recover. But there have been so many conflicting views upon other features of the case among my learned brethren in the discussions which have taken place that I feel bound to further review the matters which have been previously discussed.

One of the pleas is that the defendant delivered the deed to Mr. Gray, the plaintiff's solicitor, as an escrow, but there is not a jot or tittle of evidence in support of this plea. There is no evidence whatever of delivery to Gray except the presumption in his favor from the possession of them. The only further evidence of delivery is that defendant delivered them, with the knowledge and consent of plaintiff's attorney, to his own solicitor, Mr. Thompson, with instructions not to deliver them to plaintiff until certain things had been done. Thompson was not in any sense the agent of plaintiff. He expressly says that he was acting for defendant and Mr. Gray for plaintiff. He does not even say that the papers were delivered to him as an escrow, but that they were delivered to him by defendant with certain instructions as to the delivery, with which Gray was not satisfied. I fail to see in this that there was any delivery at all in this part of the transaction. The papers in possession of Thompson were legally in the possession of the defendant, and therefore I fail to see that they were ever delivered to anybody as an escrow. If they were, it was to Thompson and not to Gray. That the conditions on which the deeds were handed to Thompson were binding on him there can be no doubt. That they were not performed there can be no doubt; and if Thompson had delivered them in violation of defendant's instructions he would have been liable to an action, at the suit of defendant, in his character of defendant's attorney. If he had destroyed them plaintiff would have had no right of action against him, for they were not his in any sense.

Now the conditions imposed upon Thompson were all in defendant's favor and for his benefit, and therefore he might relieve Thompson of the conditions by simply going to his office and obtaining the papers. If he did this, the imaginary escrow in this case would be at an end. Surely he had a right to go to his own attorney and get his own papers. If he did so and then went and delivered the papers to the plaintiff there was a perfect delivery, whether the conditions were performed or not. If he did so without insisting on the performance of the conditions, there was a waiver of them and a perfect delivery. I do not see anything at all improbable in the supposition that he did so. On the contrary, I think there is abundant evidence to shew that it was his interest to do so. He had purchased a valuable property for some $9000. He could not complete the transaction without what was virtually a loan from plaintiff. He desired to complete his purchase, and in order to do that he wished the plaintiff to allow $6000, the amount of a mortgage which plaintiff held from the grantor of the property, to remain, he, the defendant, assuming the amount and charging the property with it. There were two ways of doing this; one was to accept a deed, leaving the former mortgage to stand, the other to give a new bond and mortgage. The latter course was adopted. The reason for not adopting the former course was, doubtless; that Brehm would naturally expect his bond to be given up, and besides he was in insolvent circumstances and his bond useless. It was doubtless on this account that the new bond and mortgage were taken, *i. e.*, in order to get the additional security of defendant's personal means and credit. The papers were drawn, but before they were delivered two difficulties arose. Brehm became insolvent, and there might be danger in purchasing from him when in insolvent circumstances. But there was a still more serious difficulty. The defendant's wife refused to release her right of dower. Owing to these two difficulties the defendant could not complete his arrangements. Had they not occurred the plaintiff would have taken the new bond and mortgage and released the old one, and in that case he would have been exactly in the same position which he now claims, no more and no less. All the plaintiff asks is to be in precisely the same position he would have been in if the transaction had

been completed as proposed. He at least has gained nothing, and could not possibly gain anything by the change which was made. But the defendant had a great deal to gain, because he had made what he considered, (and probably at the prevailing prices of real estate at that time most people would have considered,) a valuable purchase, and he could not get the title because his wife would not execute the necessary papers. There was one way of getting over the two difficulties at once, and that course was adopted. It was a very simple one, merely to take the new bond and mortgage, thus giving the plaintiff what he required in defendant's personal security, and permitting the old one to stand, because that was free from any suspicion as to Brehm's insolvency, and because it contained a release of the dower of the wife of Brehm, who was the legal owner. He did no wrong to the defendant. The only person who could complain would be Brehm, and he only if his mortgage contained a covenant of payment. It is absurd to suppose that plaintiff could foreclose both mortgages and collect double the amount due to him. The idea that any man would attempt or that the Court would sanction any such proceeding would be preposterous. The course adopted here is frequently adopted by conveyancers, *i. e.*, to permit an old mortgage to stand as a muniment of title because it contains some feature which could not be imported into a new transaction. I have known it to occur in several instances. In fact it has occurred more than once in my own practice as a conveyancer, and I believe in the practice of most conveyancers who have had much experience. It is not taking a double security at all, that is, security for a double amount. The two bonds and mortgages, in fact, in such cases constitute one security. Each of them is encumbered by some real or supposed objection or difficulty which does not attach to the other and both are necessary to constitute one complete and perfect bond and mortgage security. I consider it the most natural and proper thing in the world that the defendant should have given his consent to this as soon as the proposal was made and explained to him, and I have no doubt this was the fact. Had he consulted Mr. Thompson, which he doubtless did not, as he, (Mr. T.,) says he does not remember being asked to deliver the papers, I am satisfied he would have been advised that the proposed

arrangement was for his own benefit, and was safe and harmless. Therefore I think that the circumstances very greatly strengthen the presumption that defendant personally, or through some other attorney whom he employed instead of Thompson, delivered the deed to Gray and thereby waived the performance of the conditions. In fact, there were no conditions against defendant delivering the deed. The conditions were only against Thompson delivering it.

Now if Gray, as plaintiff's solicitor, held both of these mortgages, it was clearly defendant's interest that he should foreclose on the prior mortgage, because that mortgage was free from any question and the property would bring a much better price if sold free from the wife's dower, and thus reduce the defendant's liability on his bond, and, besides, it was part of his contract with plaintiff that he should have the security of the dower. If there was anything wrong about this the remedy would not lie here, but by defending the foreclosure suit. Without an equitable plea we cannot interfere in that transaction. It is beyond our jurisdiction and under the exclusive jurisdiction of the Equity Court. The property was sold under foreclosure. It realized but $4000 out of the $9000 paid for it, leaving some $3000 due on the mortgage and on defendant's bond, and plaintiff avails himself of that which he insisted on obtaining at the outset, viz., the personal security of the defendant. He sues on the covenant in the mortgage and on the bond. These are legal, Common Law securities. Why are they universally taken along with a mortgage if they cannot be sued upon? And what reason does the defendant give us why he should not repay to the plaintiff the whole money borrowed from him? He might have pleaded infancy, payment and half a hundred other defences on legal grounds, including fraud, which he has pleaded and abandoned, or he might have put in a plea on equitable grounds which would have given this Court jurisdiction, if he had any equities. He did not do so, because he has not a shadow of an equity; at least, if he has, it has always been open to him and will remain open to him hereafter, even after this Court, or it may be some other Court, has given judgment against him. Unfortunately for him he gave more for the property than it was worth, and he wishes

us to compel the plaintiff to contribute some $3000 towards making up his loss. If he can get anybody to give him more than $4000 for the property to-morrow, all he has to do is move the Equity Court in the foreclosure cause to grant an order to open the biddings, and to satisfy the Court according to its wise and long established practice, with which we are all familiar, that some person offers more than $4000 for the property and will bid the increased amount at a new sale; and the Court will grant the order as of course, I am sure with the plaintiff's perfect concurrence, and this is all the defendant has any moral or equitable right to demand. It is true that if plaintiff has made a good bargain at the sale, and is not willing to permit the defendant to redeem the property, he cannot recover on the bond. But that answer, if true, is not available in this Court, in answer to a legal document.

If the defendant has any such defence, he might either have pleaded it to this action, or he may yet apply to the Equity Court and show that he has requested the plaintiff to allow him to redeem, and that he has been refused that privilege. If defendant can go into the Equity Court and show this and that plaintiff is suing him at law on the bond at the same time for the balance due, that Courrt will lay a very heavy hand on the plaintiff. This is the whole amount of the doctrine laid down in *2 Fisher on Mortgages*, page 998, section 1801; and the case there cited is an Equity case, and refers to proceedings in Equity to counteract the schemes of what are called speculating mortgagees. But in reality the defendant has no such equity. He has not only not pleaded or pretended to shew an offer to redeem, but, on the contrary, the plaintiff has shewn that after the Sheriff's sale and before bringing this action, he served the defendant with a formal demand that he should come forward and pay the amount of the mortgage, offering to re-convey the property to him and threatening to sue him on his bond and covenant should he fail to do so. This first and equitable offer the defendant appears to have treated with contempt, and I do not see that, under the circumstances, this is a harsh or unjust action. It appears to me that the only sort of equitable defence the defendant has is in the nature of an appeal to our feelings of humanity. It is true he bought a property for

$9000, which afterwards sold under foreclosure for $4000, and has thereby probably ruined his prospects in life. He certainly is to be pitied. If an appeal were made to the benevolent, I dare say something could be raised for him, and probably the plaintiff, out of mere benevolence, would contribute liberally. But I think it is too much to ask us to compel the plaintiff, who appears to me to have been guilty of no wrong or impropriety, to contribute $3000 towards making up his loss.

I have looked at the cases cited, and especially *Hare* v. *Horton*, 5 B. & Ad., 715. I do not think any of them conflict at all with each other or with the view I have taken of this case. They have been sufficiently reviewed without my going over them again, but I may say that the opinion of TAUNTON, J., in *Hare* v. *Horton* is supported by the very respectable authority of Mr. Hilliard, in his *Law of Real Property*. In treating of this subject he says, (Vol. II., p. 439, section 94,); "The title is not consummated till the grantee receives the deed; but performance of the condition is not necessary to complete it." In other words, as I understand it, the party interested in its condition may waive the performance if he sees fit. I think the learned Judge should have refused to nonsuit and let the case go to the jury, with instructions to find a verdict for the plaintiff, and if the jury had found for the defendant; on the evidence before us, I think their verdict should have been set aside as against law and evidence.

MOORE *v.* MOORE.

THE owner of a horse made a fraudulent bill of sale of it to his son, the defendant, for the the purpose of protecting it from the claims of creditors. Defendant took delivery of the horse and afterwards sold it. Subsequently to the conveyance to the defendant, but before the said sale, the father conveyed the horse, by a bill of sale, to his daughter, the plaintiff, for a debt *bona fide* due from him to said plaintiff. In an action of trover by the daughter against the son for the alleged conversion of the horse,

Held, reversing the decision of the County Court, that although the first conveyance was fraudulently made to defeat the rights of creditors, and was void as against them, under 13 Eliz., the grantor could not impart any title to the plaintiff, who could only appropriate it to the satisfaction of her claim by virtue of some legal process, and that the plaintiff could not attack the conveyance under 27 Elizabeth, as that did not apply to personal property.

YOUNG, C. J., and DESBARRES, J., dissenting.

THIS was an appeal from the decision of the learned Judge of the County Court for the county of Halifax. The action was trover for a horse, and it appeared that the original

owner of the horse had made a bill of sale of it with other things to his son, the defendant, for the purpose of protecting it from his creditors. The son took delivery of the horse and sold it, but before the said sale, and after the conveyance just mentioned, the father had conveyed it by a bill of sale to his daughter, the plaintiff in this action, for a debt due her. The judgment of the Court below was for the plaintiff, and the appeal was argued before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD, SMITH and WEATHERBE, JJ.

Rigby Q. C., for appellant.—There are not many conflicting statements. The action was one of trover for a horse. *27th Eliz.* invalidates sales of real but not personal property made fraudulently, and even then only as against subsequent *bona fide* purchasers. This is a contention between two purchasers of personal property. One got a bill of sale but failed to record it. The other got a bill of sale subsequently, alleged to have been recorded, and the holder of the second bill brings the action. The Judge who tried the cause found for plaintiff. I contend that he had no right to go into the *bona fides* of the bill of sale. The fact that a person is a creditor does not give him a right to take property until he has got a judgment. At common law as between original parties the bill of sale would be perfectly good, and the statute merely provides that in certain cases it may be treated as fraudulent by judgment creditors. Every person at common law had a right to deal with and dispose of his property as he thought fit and without interference, and when he disposed of it by deed he had no further right in it, and neither he nor any one claiming under him could claim it. The law was changed by legislation by two statutes restricting the owner's absolute right of disposition; first, *13th Eliz.*, referring to real and personal property, and, secondly, *27th Eliz.* under which a transfer of real property was declared to be void as against a subsequent *bona fide* purchaser. Chapter 84, *R. S.*, 386, makes bills of sale not registered void as against purchasers. The registration here was not proved.

The bill of sale is fraudulent only as against creditors. As between the original parties it is good. A creditor as such has no right to take property, but merely has a right to

make use of process of law. There must be a judgment and an execution; *Bump on Fraudulent Conveyances*, 456. To show that *27th Eliz.* does not apply to personal chattels, see *May on Fraudulent Alienations*, 188. I may admit that the bill of sale was given by the father fraudulently, and for the purpose of defrauding creditors, and still contend that it cannot be called in question by the father or any one claiming under him, unless by a judgment creditor; *Barton* v. *Van Heythuyson*, 11 Hare, 126. In this case a conveyance, although fraudulent, was held to pass property. In *May*, 438, the same doctrine is laid down.

Meagher, contra.—In regard to points not taken below cites *L. R., 4 Ap. Cases*, 413. The son put this case on the same ground as if there was no bill of sale. He stated that the bill of sale was given in trust for the old man. He said to several parties that the goods were the old man's the same as ever. If the title was in the old man he had a right to do as he did, and the defendant is estopped from denying a fact that he recognized over and over again. The defendant had no possession. The debt that defendant paid Smith was to free the real estate he got from a judgment against it. What distinguishes this case from that in *11 Hare* is that there is conclusive evidence of fraud, and that the defendant has admitted that he had no title, and that the property was the old man's. This being the case he cannot now dispute the right of parties claiming under title from the old man; *Kerr on Fraud and Mistake*, 233; *May on Fraudulent Alienations*, 467; also a case in 8 A. & E., 121. As to relief, see *Bump on Fraudulent Conveyances*, 572; *Kerr on Fraud and Mistakes*, 196. Gifts made in fraud of creditors are void where made in trust for the donor. The statutes of Elizabeth apply to voluntary settlements on others; *Drysdale* v. *Gooley*.

Rigby, Q. C., in reply, refers to the distinction drawn between this case and the case in *11 Hare*. The Judge below had no right to receive the testimony in regard to fraud; *Benjamin on Sales*, 226. Even if the transaction was steeped in fraud the father could not take advantage of it unless he himself was deceived by the son. The property would pass.

Estoppel, as I understand it, is an act or representation by one party by which another is led to act to his prejudice. The only admission the son ever made was that the father transferred the property to defraud the creditors. This cannot affect the law. *(Meagher.*—He went further; he admitted that the property wasnot his.) *Hannon* v. *McLean*, 3 R. & C., 101, is a case in point for the defendant; also *Bradley* v. *McLean*, 2 R. & C., 584. *Mills* v. *McLean*, 1 R. & C., 379, is also in point. It comes back to the point whether the plaintiff, not having a judgment, can take advantage of the fraud. The common law did not protect purchasers. The statute makes the bill of sale void as against judgment creditors, but only voidable against purchasers.

WEATHERBE, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

In this case an appeal was taken from the County Court, because there the plaintiff was held entitled to recover in an action of trover for a horse under a bill of sale in payment for a debt from one who had previously transferred the property to defendant by a fraudulent instrument of conveyance.

Where a conveyance by a debtor is void under the statute of 13th Elizabeth, a conveyance subsequently made by the debtor to a creditor for a good consideration does not give the creditor a right to seize the property or any claim upon it, on the ground that as the transfer binds the debtor he has no title that he can transmit, and the creditor obtains no right by the purchase, and can only appropriate the property toward the satisfaction of his demand by virtue of some legal process. Admitting for the sake of argument all that was contended for below, and giving full effect to the learned Judge's finding on the facts before him, the plaintiff has no legal right to recover. The father made a bill of sale of the horse in question, with other things, for the purpose of protecting them from his creditors, to the son, the defendant, who took delivery, and afterwards sold the horse, which, meanwhile, between the conveyance to defendant and the sale by the latter, had been conveyed by the father by bill of sale for a debt due his daughter, the plaintiff in this action.

A few lines from the judgment appealed from will serve to show the grounds upon which the decision is arrived at.

The learned Judge says; "I was induced to regard defendant's bill of sale of the 12th May, 1876, as a fraudulent transfer, and as such inoperative as against any third person who had paid good or valuable consideration for the property, or any part thereof, so fraudulently conveyed."

For the purposes of our decision we need not stop to enquire whether the first instrument is fraudulent, or whether the consideration in plaintiff's bill of sale is good. We may assume, as has been determined by the Court below, that the transfer to defendant was fraudulent, and that the plaintiff was a *bona fide* purchaser, by the subsequent bill of sale, for valuable consideration. *May*, in his work on fraudulent assignments, in referring to the statute of 27th Eliz., chap. 4, (page 188,) says; "The statute does not apply to personal chattels, nor to an assignment of a sum of money charged on land and secured by a term of years, so that a voluntary settlement of personal property is good against a subsequent purchaser. For by the common law an estate made by fraud could be avoided only by him who had a former right, title, interest, debt or demand, and consequently the purchaser, not having the protection of the statute, cannot have a better title than the settlor from whom he purchased." And at page 438 *May* says; "Nor can the grantor undo his gift by making a fresh disposition of the property, (unless the subject of the gift being land he sells it for value,) for in the case of land the voluntary alienation will prevail against any subsequent voluntary disposition, and in the case of personalty it will be good against any subsequent disposition whether by will or by gift *inter vivos*, and whether voluntary or for value." I need not say that the statute 27th Eliz., chap. 4, refers only to fraudulent alienations, and that voluntary conveyances have been held to come within the language of the statute.

The misapprehension was in supposing that the question was which of the contending parties had the better title, and that the defendant's fraud was fatal to him in this action. Now the title of a fraudulent assignee is good against all the world except creditors with a judgment and a legal process, so that he can even sue for and recover a chose in action fraudulently assigned. "His title," says *Bump*, at page 453 of his treatise on fraudulent conveyances, "however, is good against

even creditors unless they protect themselves against him by pursuing that prescribed course by which alone the property can be made available for the satisfaction of debts. A creditor at large, as it is termed, cannot impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debt. Without such process he has no right to meddle with the property, and if he does so he is liable to all the consequences of an unlawful interference equally with any other person." The author goes on to show that the creditor in possession could not retain the property on the ground of indebtedness, or set up his judgment as an offset to the demand, or that if sued by the fraudulent assignee for conversion of a note he could not, though holding a judgment against the assignee, impeach the fraudulent transfer without an execution, attachment or some other legal process which authorizes the seizure of the property. A subsequent conveyance does not strengthen the plaintiff's position. It gives no title whatever because the debtor had none to confer.

If further authority is required, *Barton* v. *Vanheythuyson* 11 Hare, 126, is directly in point. An assignment was made of lands and personal chattels in March, 1850. The assignor afterwards executed a mortgage as security to a creditor, without notice of the first deed of the lands and chattels. The first deed was held to be fraudulent as against creditors, and as to the land under the statute 27th Eliz., chap. 4, the estate passed to the creditor entitled under the mortgage, but as to the personal chattels the Vice Chancellor said; "The next question is with regard to the personal chattels, to which the statute of the 27th Eliz, chap. 4, does not apply. . . . The Messrs. Stone," (the mortgagees,) "cannot avail themselves of the objections to the first assignment on the ground of covin to acquire an interest in the chattels by virtue of the subsequent mortgage deed. . . . It is, I think, clear that, although this conveyance was fraudulent, yet it had the effect of passing the property. When a voluntary settlement is once avoided under the statute 13th Eliz., chap. 5, all the subsequent creditors are let in, together with those creditors against whom the settlement is fraudulent within the statute. But to what are such

subsequent creditors let in? Not to an estate in the chattels, but to a right as against them. The previous assignment, therefore, is necessarily good against such subsequent creditor claiming merely in that character. He can only enforce such claim under the statute 13th Eliz., chap. 5, as a person delayed by the voluntary gift within the meaning of that statute. This may be considered as somewhat hard upon the Messrs. Stone, for if they had recovered a judgment against Vanheythuyson, (the mortgagor,) they might have obtained possession of the goods, but they claim under the assignment only, and by the assignment they could not obtain any right in these chattels."

I am, for the reasons mentioned, of opinion that the appeal must be sustained and the judgment below reversed.

SMITH, J., concurred.

MCDONALD, J.—The act *13 Eliz.*, chap. 5, sec. 2, enacts that every conveyance of land, hereditaments, goods and chattels, or of any lease, rent, common, profit or charge out of land, &c., by writing or otherwise, and every bond, suit, judgment and execution to be made, with intent to defraud creditors or others of their actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, shall be deemed *only* as against *that person* or his heirs, executors or administrators and assigns, whose actions, &c., are or shall be in any way disturbed, delayed or defrauded, to be utterly void.

I do not think that there is much room to doubt the meaning of the word "others" as here used, the statute, as it appears to me, intending to protect creditors in their rights as such, and others, not being creditors, in their rights to damages, penalties, forfeitures, &c., for if the word "others" had not been used in that sense, or if it had not been used at all, the statute would read and be understood as if creditors, *as such*, were assumed to be capable of maintaining suits in all the cases enumerated.

In this statute there is not a word said of subsequent purchasers for value, and for fourteen years after it was passed fraudulent conveyances of land were subject to the same rules of law, and could only be avoided in the same way as fraudulent transfers of personalty,—the act itself providing

that such fraudulent conveyances should be void *only* as against the persons having the rights enumerated therein, (but not including subsequent purchasers). After the lapse of that time the act *27 Eliz.*, rendered fraudulent conveyances of "*land, hereditaments and tenements*" void *as against subsequent purchasers* for value, but left the law with respect to personalty as it was under 13th Elizabeth. Why pass the 27th Elizabeth if the 13th Elizabeth, or the common law, or both, were equally effective to render a conveyance void on the ground of fraud as against subsequent purchasers? If either or both were not sufficient, then, for that purpose, they are not sufficient now.

May, at page 438, says that a grantor cannot undo his gift by making a fresh disposition of his goods unless, the subject of the gift being land, he sells it for value; for in the case of land the voluntary alienation will prevail against any subsequent voluntary alienation, and *in the case of personalty* it will be *good against any subsequent disposition whether by will or by gift* inter vivos, *and whether voluntary or for value.*" At page 188, referring to the 27th Elizabeth, he says; "The statute does not apply to personal chattels, nor to any assignment of a sum of money charged on land and secured by a term for years, so that a *voluntary settlement of personal property is good against a subsequent purchaser;* for, by the common law, an estate made *by fraud* could only be avoided by him who had a former right, title, interest, debt or demand, and consequently the purchaser, not having the protection of the statute, cannot have a better title than the settlor from whom he purchased."

That the transfer of the property in question was fraudulent, as against creditors, and might have been set aside by the plaintiff, upon showing that she was a creditor, there can, I think, be no doubt, but she brought an action which cannot be maintained without title. In the face of the statute and the authorities I think she has no title whatever as purchaser, and it will not be contended that she can recover, in this action, merely because she was a creditor of the vendor. Her claiming in both capacities does not improve her position, and her misfortune is, not that the law withholds her rights from her, for that it does not do, but that she has not adopted the

proper remedy in the first instance. I would much prefer if I could have come to a different conclusion, but I think that the plaintiff cannot succeed in this action.

SIR W. YOUNG, C. J., delivered the following dissentient opinion:—

I shall not go into the facts of this case in detail, because they are fully stated in the report of the County Court Judge, and the fraud perpetrated against his sister the plaintiff, is clearly shown. Having got into his possession all his father's property, under a deed fraudulent by his own showing, except the horse conveyed by the father to the plaintiff, he sells that also and leaves her penniless. I should be sorry if the law were found so widely apart from justice as to compel us to uphold so scandalous a transaction. It is to be noted that there is nothing to impeach the good faith of the daughter. For years she tended the father with affectionate care, and he acknowledged himself to be her debtor by reason of her services. She was not a purchaser, therefore, but a creditor, and the only thing that stands in her way is the fraud of the defendant in taking a deed without consideration, which the law regards as absolutely void, and being so, I cannot regard it as any answer to her title, founded on the subsequent *bona fide* conveyance to herself. I cannot consent to view this case in the light only of the two statutes of Elizabeth, but in the broader and clearer light of the common law. "It has been frequently observed," says *May*, in his work on these statutes, fol. 2, that the 13th Elizabeth, chap. 5, as to creditors, as he puts it, but which ought to be as to creditors *and others*, was merely declaratory of what was previously the common law of the land; *(Per* Lord BROUGHAM, 12 Cl. & Fin, 44,) and Lord COKE several times comments on the word *declare* used in the statute with that view. Lord MANSFIELD also said, in *Cadogan* v. *Kennett*, Cowp., 434, that the principles and rules of the common law, as now unanimously known and understood, are so strong against fraud in every shape, that the common law would have attained every object proposed by the statutes 13 & 27 Elizabeth. The law abhors covin, and therefore every covinous act shall be void; *3 Com. Dig.*, 395. This appears also by the earlier statutes;

50 Edw. III., chap. 6, and *3 Hen. VII.*, chap. 4; *Kerr on Fraud*, 196.

I have said that in my view the plaintiff was a creditor, but in that character alone she could not have maintained trover. It is the deed of October, 1876, which makes her a purchaser and gives her title. In *Twyne's case*, 3 Coke, 83, it was resolved that no purchaser should avoid a precedent conveyance made by fraud or covin but he who is a purchaser for money or other valuable consideration. The plaintiff was such a purchaser, and, therefore, as I conceive, entitled to our protection.

It is true that Mr. May in some passages of his treatise carries the doctrine somewhat further, but the cases hardly sustain him in it, and the equities are altogether against it. At page 5 he says that a voluntary assignment of chattels, (which are not within the statute of 27 Elizabeth, chap. 4,) may still be good against a subsequent purchaser, and he cites *Jones* v. *Couchen*, 1 Sim. & Stu., 315. But that case only held that voluntary settlements of personal property are good against a subsequent purchaser for valuable consideration when made by persons who are not entitled at the time. Here we are dealing with a conveyance not merely voluntary but fraudulent, made by the elder Moore when deeply indebted, for the avowed object of defrauding his creditors, and whom the Judge below treated as unworthy of belief. So in *May*, 188, when he says that a voluntary settlement of personal property is good against a subsequent purchaser, he cites the two cases of *Jones* v. *Couchen* and *Sloane* v. *Cadogan* already referred to.

In *May*, 438, he says that in the case of personalty a voluntary deed by a grantor will be good against any subsequent disposition, whether by will or by gift *inter vivos*, and whether voluntary or for value, but he relies for this lax proposition upon two cases that have no analogy to the case we have in hand, and which is so abhorent to my sense of right that I would be slow to assent to any doctrine that would uphold it. I think that the appeal should be dismissed with costs.

DESBARRES, J., concurred in the opinion of the Chief Justice.

LIVINGSTONE *v.* SCHOOL TRUSTEES, BOULARDERIE.

H. L., one of three School Trustees, contracted with the other two, M. McL. and J. M., who described themselves as "Trustees of School Section No. 52, S. S. Boularderie," to build a school-house, and the agreement contained the following clause: "The aforesaid M. McL. and J. M. as Trustees for the School Section, do hereby bind themselves to pay the aforesaid H. L. the sum of $160, &c., &c." The agreement was signed by all three Trustees, not sealed, and the word "Trustees" was written opposite the names. H. L. having brought his action against the other two Trustees personally,

Held, reversing the decision of the County Court, that the defendants were not personally liable.

THIS was an action brought in the County Court against School Trustees to recover the price of a school house, seeking to make them personally liable. The defence was that the defendants were a corporation. The decision of the County Court was in favor of the plaintiff, and the appeal from that decision was argued before SIR W. YOUNG, C. J., MCDONALD, JAMES and WEATHERBE, J J.

Graham, for appellants.—The action is by Hugh Livingstone against Murdoch McLean and John Morrison, on the following agreement:—

BLACK BROOK, *February 20th, 1878.*

I, Hugh Livingstone, hereby contract and agree with Murdoch McLean and John Morrison, *Trustees of School Section No. 52, S. S. Boularderie*, to build a school-house of the following dimensions; Length 25 feet, breadth 20. Post 11 feet. Sills 7 × 7 in. Plates 5 × 5. Posts 5 × 5. Ground floor beams 6 × 7. Loft beams 4 × 6. Posts 2 feet 8 inches apart. 9 pair rafters. 13 feet 6 inches allowance for projections besides projections all round. 9 inch wide beams for ground floor, 2 feet 6 inches apart. Beams for loft 3 feet apart. Double floor of good spruce boards. 4 windows, 2 in each side, as shewn in plan. Glass 9 × 12. 1 pannel door 7 feet high, 2 ft. 8 in width, put in place as shewn on plan, with lock and key. The wall and roof shingled with good shingles, 5 inches to the weather. Also a brick flue from the loft beams. The whole to be finished substantially and in a workmanlike manner on or before the first of June next. The aforesaid Murdoch McLean and John Morrison, as Trustees for the school section, do hereby bind themselves to pay the aforesaid Hugh Livingstone

the sum of one hundred and sixty dollars, ($160,) the first of June next, when the aforesaid Hugh Livingstone will fulfil his part of the above agreement.

(Sgd,) JOHN MORRISON,
MURDOCH MCLEAN,
HUGH LIVINGSTONE,
} *Trustees.*

The pleas were that work was not completed in a workmanlike manner, and that defendants were a body corporate, and should have been sued as such. (Reads papers and grounds of appeal.) The pleas that defendant should have been sued as a corporation were pleaded principally on the decision of the Equity Judge in *Cook* v. *Davidson*, 1 Equity Decisions, R. & C., 37. The sections of chapter 32, Revised Statutes, "Of Public Instruction," to which I refer, are section 27, which makes School Trustees a body corporate; section 34, sub-section 4. In *Cook* v. *Davidson* the plaintiff, instead of suing, went to the Equity Court for a *mandamus*. It was a suit for money loaned for the purposes of the section, and a note given. The mistake made was in giving their name and calling them Trustees. They were not only described as Trustees in the writ, but there was an allegation that they were Trustees. Even after a judgment obtained, an execution is of no avail, and resort must be had to a *mandamus*. If it is the contract of the corporation they must be sued as such, and not as individuals. *Anderson* v. *VanSittart*, 5 U. C., Q. B., 335; *Sheriff* v. *Patterson*, Id., 610. An agreement was made *as Trustees;* Held that defendants were not liable as individuals. In *2 Taunt.*, 374, the Mayor of a city was sought to be made liable. The agreement was that of the corporation and not that of the individuals. (MCDONALD, J.—I do not suppose it ever entered their minds to make themselves liable.) Cites *Alexander* v. *Sizer*, L. R., 4 Ex., 102. A note is a stronger case than this. I do not rely on their signing as Trustees so much as on the body of the agreement, *Abbot on Corporations*, Vol. II., p. 175, section 48; *Dillon on Municipal Corporations*, Vol. I., p. 467; *6 Cushing*, 54; *20 U. C., C. P.*, 363; *Id.*, 320. There is a difference between instruments under seal and those not under seal, and a tendency in the former case to hold the parties personally liable. If a corporate seal were affixed, I

think it would shut the question of personal liability out altogether. (WEATHERBE, J.—If a contractor demanded a written agreement, how else would it be framed than the present one? YOUNG, C. J.—In this Province a corporate seal is not required to render valid acts done within the scope of the corporation.) It could not be made more the contract of the corporation than it is. I don't see how they could exempt themselves more than they have done.

Rigby, Q. C., contra.—There is a written contract, and we cannot go outside of it. Why should it be assumed that they are a corporation? (WEATHERBE, J.—Why could you not sue the corporation?) I could do so for a contract made with the corporation. There is no such corporation as the one described in the agreement. I have sued the parties. The description of the corporation is given in section 25, p. 170. There is nothing in the agreement to shew that it was for any corporation that could be made defendant in this suit. If such evidence has been admitted it cannot affect the contract. The Trustees of a school section cannot contract with one of their number. *Ontario Digest*, No. 14, p. 3070, 3071. On the contract can you find any corporation or person with whom Livingstone can contract on this paper other than the defendants? In the cases referred to for appellant there was a corporation recognized on the record. Here the word Trustees was merely descriptive. It must appear on the face of the agreement that there is such a corporation as the one for which they bind themselves. The distinction is strict and narrow. It is not disclosed on this contract that there is any such body as the one described. We must, therefore, look to the agents, the principals not being disclosed. (MCDONALD, J.—Suppose the action had been brought against them as Trustees of District 52, in the County of Cape Breton, do you think this variance would be fatal? WEATHERBE, J.—Is not the onus on the parties making the agreement to relieve themselves by shewing the existence of the corporation?) Most certainly. If a man contract thus; "I, A. B., executor of C. D., agree to pay to E. F., as such executor," he would be liable. (*Graham.*—The fact that he contracts as executor would not exempt him unless it appears that he was to pay out of trust funds. WEATHERBE, J.—The question is whether this case comes

within that principle.) This case, on the face of it, shews that it was not a contract with the Trustees. It is a contract by two Trustees with a third. If it is illegal for two Trustees to contract with a third, they must have contracted as individuals. (YOUNG, C. J.—The real fact is that the corporation should have called on the section to pay it. I am not sure that a member of a corporation cannot contract *bona fide* with a corporation with which he is connected.) I admit that, but he cannot contract for the building of a school house. (MCDONALD, J.—I do not see why, when the the school-house is put up, and they take advantage of it, they should not pay. YOUNG, C. J.—I do not think the matter should have ever come here. WEATHERBE, J.—The argument turns entirely on the point whether the words fix the corporation. MCDONALD, J. —Mr. Graham goes further, and says you cannot bind the individuals. WEATHERBE, J.—If two individuals attempt to bind a corporation, but, by mistake, use words which do not bind the corporation, do they make themselves personally liable ?) If the contract does not bind the corporation it binds the individuals. There is evidence here that these persons individually promised to pay. (MCDONALD, J.—That may be for the corporation.) It does not appear so.

WEATHERBE, J.—I understand Mr. Rigby to contend that if the words here are sufficient to identify the parties with the corporation they must be relieved; also, that in the cases cited by Mr. Graham a recognized body is indicated.

Graham, in reply.—There is no such thing as a school district in this Province. The words of the act are taken from the Ontario Statute, where they have districts. The act respecting Public Instruction has established public schools. It provides that sections shall be laid off, and defines in clause 83 what is meant by a section; also in section 13, sub-section 1. I suppose it will be assumed that the law requiring public schools to be established was carried out. It is proved that these parties were the Trustees, and were proceeding under the act respecting public schools. (MCDONALD, J.—The contention is that the misdescription renders the parties personally liable.) There is a case on that point in *1 Thomson's Repts.*, in connection with the Windsor College. (WEATHERBE, J.—

If you were suing, how would you describe the Trustees ?) I would have to sue them in their proper corporate name, or I could be called upon to amend. It is evident that the Trustees did not sign the contract in the ordinary course of business. They had no object in building a school house for themselves. In a case in *Cochran's Repe.*, a man was allowed to shew the intention with which he placed his name on a note, and I think the Court, here, can look at the evidence. (WEATHERBE, J.—I have a strong impression that if the Trustees are not bound by this, the contract should be reformed.) *1 American Leading Cases*, 738. The defendants are not the Trustees now, and have no power to levy on the section. (WEATHERBE, J.—It makes no difference.) There is no evidence of the completion of the work. It was payable on completion and approval; *Addison on Contracts*, 664, 666.

WEATHERBE, J., now, (May 7th, 1880,) delivered the judgment of the Court :—

In *Dillon on Municipal Corporations* it is said that where officers or agents of an incorporation, acting within the scope of their authority, in executing an instrument on behalf of the incorporation, sign their own names and affix their own seals, such seals are simply nugatory, and the instrument, according to the weight of modern judicial opinion, is to be regarded as the simple contract of the corporation, and will bind the corporation and not the individuals executing it, where the purpose to act for the corporation appears from the whole paper, and where there are no words evincing an intention to assume a personal liability. In *Anderson* v. *Van Sittart et al.*, 5 U. C. Q. B., 336, the question arose on a demurrer to the declaration, and Chief Justice ROBINSON said; "I am far from saying that if the plaintiff had not charged the agreement to have been made by them *as Trustees*, (which was only stating the truth,) he could have established any claim against them individually, but having expressly so charged it, the case is free from any doubt." He adds; "The defendants were merely carrying into effect in a corporate capacity the provisions of an act of parliament, not a private local act, but a general law of the land, which the school teachers and all others are bound to notice. The plaintiffs, therefore, must be taken to have known, and doubt-

less did know, that they were contracting with him on behalf of the public, and not individually; he could only look to the public fund for his remuneration, and not to the Trustees individually as being personally liable." In *Sheriff* v. *Patterson et al.*, 5 U. C., Q. B., 620, the same question arose on demurrer, and ROBINSON, C. J., there said; "It is plain he," (the plaintiff,) "cannot sue the defendants in their natural capacity for acts done by them as Trustees, and for which they are made liable by the statute to be sued in their corporate capacity." The case cited to us from *2 Abbot on Corporations* seems to be in point. The agreement was between E. H. and B., Trustees of the L. U. Cheese Manufacturing Co., parties of the first part, and J. and M., parties of the second part, for the manufacture of cheese, etc. The company was incorporated, and these Trustees were authorized to make the contract, and it is said J. and M. had a full knowledge of these facts. It was held by the New York Supreme Court that E. H. and B. were not personally liable.

In the case before us we think there was no intention nor any mutual understanding appearing from the contract under the law that the defendants should be made personally liable, and that therefore the appeal must be sustained.

JENKINS *v.* BOSSOM.

THE defendant and one Bushell applied to the plaintiff, a broker, to raise some money required by Bushell, who owned bank stock and had an asset due from Almon & Mackintosh, amounting in the whole to $504. Plaintiff sold the bank stock and obtained the balance of the sum required by discounting a note for $200 made by defendant to the order of Bushell, endorsed by him to plaintiff. Contemporaneously with the note a memorandum was signed by plaintiff, defendant and Bushell as follows; "A note received from F. Bossom for $260, the conditions of which are that said note is given and to be paid by the first dividend of the estate of Almon & Mackintosh, and if the first dividend does not amount to $300, the balance shall be paid on the day of maturity of said note, so that Bushell shall not be called on to pay any money whatever to protect said note, and that the amount of Bushell's account be transferred to Jenkins, and to be held by him as collateral for said note's payment, and he alone to draw said dividend and place to credit of said note for $260, and then the transfer made by Bushell to Jenkins is to be transferred to Bossom when Jenkins has received in full the sum of $504." Plaintiff retired the note and sued the defendant for the amount.

Held, reversing the decision of the County Court, that the agreement did not control the note so as to alter its character as a promissory note between the parties and prevent the plaintiff from recovering.

WEATHERBE, J., dissenting.

THIS action was brought in the County Court to recover the amount of the following promissory note:—

[$260.] HALIFAX, N. S., *26th April, 1878.*

Three months after date, for value received, I promise to pay to the order of Robert Bushell the sum of two hundred and sixty dollars, payable at the Bank of British North America. FRED'K BOSSOM.

Contemporaneously with the making of the note the following memorandum was drawn up, signed by the maker and payee of the note and by the plaintiff to whom it was endorsed:—

[MEMO.] HALIFAX, N. S., *26th April, 1878.*

A note received from Frederick Bossom, dated as above, for two hundred and sixty dollars ($260), at three months from date, the conditions of which are that said note is given and to be paid by the first dividend of estate of Almon & Mackintosh, and if the first dividend does not amount to the $260, then the balance shall be paid on the day of maturity of said note, so that Robert Bushell shall not be called upon to advance any money whatever to protect said note, and that the amount of Robert Bushell's account be transferred to T. K. Jenkins, and to be held by him as collateral for said note's payment, and he alone to draw the dividend above mentioned and place the same to credit of said note for $260, and then the transfer made by Bushell to Jenkins is to be transferred to Bossom when Jenkins has received in full the sum of five hundred and four dollars.

T. K. JENKINS,
ROBERT BUSHELL,
FRED'K BOSSOM.

The following is the judgment pronounced by the learned Judge of the County Court, JOHNSTONE, J.:—

This action is brought on a note dated April 26th, 1878, for $260, at three months, payable at Bank of British North America, made by the defendant to Robert Bushell and by him endorsed to the plaintiff, who discounted it in one of the banks and retired it shortly after its maturity. Contemporaneously with the note an agreement of the same date

was entered into and signed by the three parties,—Bossom the maker, Bushell the payee, and Jenkins the endorser. This agreement, though written on a separate paper, is to be taken as part of the note, as valid between the parties to it, and as qualifying the liability of the respective parties on the note. By the agreement the note was to be paid out of the first dividend of Almon & Mackintosh's estate. If the dividend was not sufficient for that purpose, the balance must be paid on maturity, so that Robert Bushell, the payee, should not be called upon to advance any money for protecting the note. This is as between Jenkins and Bushell, and assures the non-liability of the latter in the event of the first dividend failing to meet the note. As between Jenkins and Bossom, the condition on which the note was given was that it was to be paid out of the first dividend of Almon & Mackintosh's estate, and that the amount of Bushell's account was to be held by Jenkins as collateral for the note's payment. For what purpose was the transfer to be made? And to what does the word collateral refer? The transfer of Bushell's account was the consideration for relieving him of his liability as payee on the failure of the dividends to retire the note, and "collateral" refers to Bushell's account, which was to be responsible for the balance between the face of the note and the amount of dividends, and, further, Jenkins was the sole party to draw the dividends, which he was to place, not to the credit of Bossom on account of the note, and not to pay to Bossom, provided he had retired the note, but to place to the credit of the note, and then, *i. e.*, after the first dividend had been applied to the payment of the note and the collateral security had made up the deficiency, the transfer made by Bushell was to be transferred to Bossom, but only after Jenkins had received the full sum of five hundred dollars.

Holding this agreement to be a contemporaneous written contract controlling the terms of the note, and construing it together with the note so as to give each their due effect, I do not see how Bossom can be charged with any legal liability to pay the note. Jenkins was to draw the dividends, place them to the credit of the note and hold Bushell's account as collateral for its payment, and was not to transfer the security of Bushell's account until he had received thereout $500.

What if the dividends should have been in excess or almost equal to the face of the note, or if the collateral security, either alone or in addition to the dividends, was sufficient to pay the note? Was Bossom still to be liable to Jenkins for the face of the note and to be driven to his possible remedy at law to recoup himself? The evident intention, as gathered from the agreement, was that Bushell, in consideration of his transfer, was to be relieved from all liability, and that Jenkins, in consideration of receiving the dividends and transfer of Bushell's account, was to protect the note.

A reference to the evidence in the cause places the correctness of the above beyond doubt. The $504 mentioned in the agreement is made up of six shares in the Pictou Bank, part of Bushell's account with Almon & Mackintosh, $244, and the note for $260,—the whole of which Jenkins was to receive before any transfer of Bushell's property. In his cross-examination Jenkins says, "there was a writing given providing for the payment of the note," and that the agreement contained the provisions for the payment of the note. Jenkins has already received two dividends on the note amounting to 35 per cent, one of $64.80, two days after the note fell due, and the very day on which it was sued, and a second of $25.92 on the 8th May, 1879, making together the sum of $90.72, and Mackintosh says that the estate will pay more, that the assets are not yet exhausted. The receipt and retention of this money by Jenkins is strong proof, to my mind, that the intention of the parties was as I have before indicated. The evidence shows that Bossom received no consideration for the note and that the plaintiff was aware of that fact. Bossom says that the agreement was the plaintiff's proposition; that his proposal was to have nothing to do with plaintiff, but that he, Bossom, should take the security, give an endorsed note of Murray's to Bushell and six shares in the Pictou Bank, and that he would not have signed the note except on the condition that he was not to be liable, and the plaintiff, though a third party, is not a remote party, so as not to be affected by the want of consideration between the immediate parties.

For these reasons, I do not think that the plaintiff has made out a case, and I give judgment for the defendant.

An appeal was taken from this judgment and argued February 19th, 1879, before DESBARRES, MCDONALD, SMITH and JAMES, J J.

Sedgewick, in support of appeal.—There is no condition here to invalidate the absolute promise to pay on the face of the note. The meaning of the agreement is that if Jenkins got any money out of the estate of Almon & Mackintosh he was to give defendant credit on the note, and that the balance was to be paid on maturity. No memorandum can vary the terms of the note; *1 Fisher's Dig.*, 1129, 1130; *Byles on Bills*, 94, 95, (marginal paging,); *Id.*, 98. The agreement simply shews that collateral security was given for the payment of the note. That does not affect the right to sue on the note. *4 A & E.*, 786; *1 M. & W.*, 232; *9 Q. B.*, 312.

Motton, contra.—The note has remained in the hands of Jenkins, a party to the written agreement. The agreement is contemporaneous with the note, and makes it payable only in the event of a dividend not being paid by Almon & Mackintosh. The agreement is as much a part of the note as if endorsed upon it. Jenkins undertakes by the agreement to exhaust certain funds before recovering upon the note. The principle upon which the case in *11 A. & E.*, 213, is decided is want of notice. Jenkins cannot say he had no notice of the condition here. Cites *4 M. & S.*, 25; *4 Camp.*, 127; *2 Camp.*, 205; *14 M. & W.*, 344; *4 B. & A.*, 619; *Prudential Insurance Company* v. *Bennett*, (decided by this Court, not reported.) If the agreement here had been objected to on being tendered in evidence, and not received, or received subject to objection, our position might have been different, but the note and agreement are both in without objection. Cites *10 A. & E.*, 98.

Sedgewick, in reply.—The note here is no good for any purpose whatever as a note if this agreement is a condition. The agreement only amounts to this, that, if the amount of the note, or any amount, is collected out of the collateral, it shall be credited on the note. The obligation is absolute on the maker to pay the amount of the note, or whatever is due upon it, at maturity. The note must be paid in full at maturity and there is nothing in the agreement to vary those terms The agreement here is not so much relative to the note as to the assignment of Bushell's claim on Almon & Mackintosh.

The COURT, (March, 1880,) delivered judgment, in pursuance of which the cause was remitted to the County Court, and the learned Judge of that Court, after trial, pronounced the following judgment:—

This action was brought on an instrument purporting to be a promissory note made by the defendant to Robert Bushell and by him endorsed to plaintiff. The defendant set up an agreement or memorandum made contemporaneously with the note and signed by the plaintiff, Jenkins, to the defendant. This agreement, together with the making of the note, its stamping and endorsation, was admitted, and the sole question to be determined is, what effect has the agreement in controlling the note and discharging the defendant from liability thereon; and, reading this memorandum as part and parcel of the note, I am of opinion that it controls the instrument and so changes its character that at all events it cannot be declared on as a promissory note. A note must be for the payment of money at all events and must not be subject to indefinite or contingent deductions, and I do not see how it is possible to construe the agreement in connection with and as a part of the note, without arriving at the conclusion that it changes the liability of the parties to the note and renders it subject to contingent deductions. The memorandum states that the note was given on condition that it should be paid by money provided from other sources than the party legally liable. Provision is made for the contingency of the dividend failing to meet the note, in which event the balance is to be paid at the maturity of the note, by whom it is not stated. Bushell, however, was not to be called upon to advance any money for that purpose, but the amount of his account was to be transferred to plaintiff and be by him held as collateral security for the note's payment, and he alone was to draw the dividends and place them to the credit, not of Bossom on account of the note, but of the note. Now here the note is made subject to the contingent deduction of the amount paid by Almon & Mackintosh. In *Robbins* v. *May*, 11 A. & E., 213, the instrument declared on was as follows; "at twelve months after date I promise to pay P. & C. £50, to be held by them as collateral security for any moneys owing to them by J. M. which they may be unable to recover on realizing the

securities they now hold and others which may be placed in their hands by me." Lord DENMAN held this instrument not a promissory note and that it could not be declared on as such. "It gives notice on the face of it to all the world that the promise is only a conditional one," and PATTERSON, J., said; "if the note had been endorsed before it was due it would have been worthless in the hands of the indorsee." Here the promise in the note is at best only a conditional one to pay any balance due after the dividends received, and the amount of the dividend is indefinite, not being stated. So in *4 B. & Ad.*, 619, a promise in a note to pay all the charges of a sick club at H., out of certain interest, the remaining interest to be paid on demand; *held* not to be a promissory note but an agreement engrafted on the note, and that the amount of the sick club charges was uncertain, and that the instrument, as far as regarded this contingent demand, could not be a promissory note, and that the transaction was entire. So in *10 A. & E.*, 98, it was held that a note to be a promissory note must be entire, and that the instrument in question contained a promise to pay joined with an agreement for something else. The American law is to the same effect. In *20 Pick.*, 132, it was held that a promissory note must be for the payment of a sum certain, and that a bill or note promising to pay after deducting all advances was not a negotiable instrument. And Lord KENYON, in *5 T. R.*, 482, said it would perplex commercial transactions if paper securities of this kind were issued out into the world circumscribed with conditions and contingencies, and the persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would be reduced to a certainty. For the reasons there stated this instrument, taken with the memorandum, does not fulfil the requirements of a promissory note, and I must nonsuit the plaintiff.

This judgment was appealed from, and the cause was argued a second time before the Court in *banco*.

Sedgewick.—The instrument is a promissory note unless its character as such is taken away by a contemporary agreement forming part of the same transaction. The agreement here does not destroy the character of the note. The Court

below was bound to follow the decision of this Court; *40 L. J. R.*, 381. Cites decision of JAMES, J., on the former appeal. The agreement says the note is to be paid at maturity expressly, and this must be whether anything was got from Almon & Mackintosh or not. The balance is to be paid on the day of the maturity of the note. They did not know but what the dividend would pay the note, and it may have been paid at once. (MCDONALD, J.—The agreement seems to say that if funds are derived from a certain source before the maturity of the note, they are to be applied to the payment of it, but if not the note is to be paid at maturity.) The agreement and consideration have been reduced to writing and you cannot go outside of it. Bossom's evidence shows that he received consideration. If the agreement only provides a fund out of which the note is to be paid, that does not interfere with the note. We can recover on the common counts.

Motton, Q. C., contra.—There are no common counts. If the agreement had been endorsed on the note it would have destroyed its negotiability. Any contingency which varies the amount of the note destroys its negotiability; *Byles on Bills*, 147. The fact that any sum paid in the mean time was to be credited destroys the character of the instrument as a note. The agreement is described as a condition upon which the note is given. (DESBARRES, J.—We are to say whether it is a condition or not.) There is nothing providing for the payment of the note by Bossom, and Jenkins advanced nothing. Jenkins, holding the securities, agreed to protect Bushell. Why should Jenkins get the dividends unless he was to retire the note? As to negotiability, cites *4 Camp.*, 127; *1 M. & G.*, 25; *2 Camp.*, 204; *14 U. C., Q. B.*, 430. The County Court Judge has found distinctly that there was no consideration, and that the plaintiff knew it.

Sedgewick, in reply.—When Judge Johnstone speaks of no consideration, he does it in reference to the construction of the instrument itself, and his judgment is based solely on the ground that the agreement destroyed the negotiability of the note.

JAMES, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

This case comes before us on a second appeal from the County Court Judge for Halifax. On the first trial the plaintiff was nonsuited on the ground that the written agreement made between the maker and payee of the note and Jenkins, who is now the endorsee of the note, and the plaintiff in this action, and made at the same time as the note, though on a separate paper and between different parties, was to be taken as a part of the note and as controlling its terms, and this judgment of nonsuit was during the last Term reversed by the unanimous judgment of this Court, and the cause sent back for a new trial. The learned Judge below, after hearing the evidence at the second trial, has again given judgment for the defendant, in which, I regret to observe, he formally and repeatedly reiterates, as part of his judgment the very legal propositions which this Court had deliberately overruled. I can only presume that the learned Judge was in some way misinformed as to the nature of the judgment of this Court. It is unnecessary that I should give any answer to this part of his judgment, as it is already disposed of by the previous decision of the Court. Under the circumstances, it is not to be wondered at that the learned counsel for the appellee should have endeavored to sustain this reiterated decision of the Judge below.

The only question now before us is whether the facts given in evidence at the second trial, and which were not previously before us, so far vary the case as to entitle the defendant to retain his verdict in the County Court. The note and agreement were set out in the former judgment and need not be repeated here. The origin of the transaction was as follows; Bossom, the maker, and Bushell, the payee of the note, waited upon the plaintiff, (Jenkins,) acting as a broker, and asked him to assist them in raising money. They gave him the note and he gave them the amount, less discount. He afterwards discounted the note at the bank, and at its maturity it was dishonored and retired by the plaintiff, who sued for the amount. The other facts in evidence serve, indeed, to confuse, but not in any degree to vary this otherwise very simple transaction. I shall only refer to such as may have a bearing

on the points in dispute. The learned Judge below has found that "Bossom received no consideration for the note, and that plaintiff was aware of the fact,"—a finding which I need hardly say was wholly immaterial. But Bossom did receive consideration for the note. Almon & Mackintosh owed Bushell, the payee of the note. They were embarrassed, and Bossom entered into the transaction to protect them by paying Bushell's demand. This is not only sworn to by Jenkins, but is expressly admitted by Bossom in his cross-examination. The only contradiction in the evidence is that Bossom asserts that there was a verbal understanding that he was not to be called upon to pay the note. If this evidence had been objected to it could not have been received; but, as it was not objected to, it must be dealt with. I need only say that it is contradicted by Jenkins, which is quite sufficient. Both parties being interested as plaintiff and defendant respectively, *presumitur pro negante*. But this evidence is abundantly contradicted by the note, which the Court has decided to be a note payable by the promissor, and I may say by all the facts of the case. All the interest the plaintiff has in the matter was to make a moderate commission of twelve dollars for his trouble and risk, which was promised to him, but not paid. But it is objected that there is no ground laid in the rule for appeal to support this conclusion upon the evidence. The grounds are:—

"First. Because the judgment is against law and evidence." This the Court has in several cases decided to be too general.

"Secondly. Because the agreement put in by defendant could not control the operation of the note as against defendant or change its effect." This ground refers to the argument based on the former decision in the case, and is therefore sustained, and it is quite sufficient to cover the whole contention in this argument.

"Thirdly. Because there was no evidence produced to affect the liability of the defendant to the plaintiff on the note." I think this ground sufficiently specific. The objection is technical, and should not be too severely enforced. A substantial compliance with the rule of the Court ought to be sufficient, and I think this is a substantial compliance, even if the second ground was not sufficient. I don't know what else it can mean than that the defendant had failed to give sufficient evidence

to shew that he was, under the contract between the parties, to be free from liability; and surely had the ground been stated in this form it would have been sufficient.

But admitting the grounds not to have been sufficiently specific, the objection ought to have been taken before. I think such an objection, so purely technical and so easily amended, ought in all cases to be taken at the earliest possible moment, either by moving to strike the cause off the docket, or by way of preliminary objection; and when circumstances do not permit this course, the counsel insisting on it should, at the very latest, take the objection before proceeding with his own argument. But in this case the cause was permitted to remain on the docket, the argument was permitted to be entered upon, and the appellant's counsel to conclude his argument, without the objection being taken. The counsel for the appellee should at least then have taken the objection before proceeding with his own argument; but this he did not do until the close of his own argument. I not only think the grounds laid quite sufficient, but that to allow such an objection to prevail at that stage of the proceedings would be unfair to the appellant, who, had it been made earlier, might have applied for leave to amend. But it would be unfair also to the Court and to the public, who are deeply interested in the progress of the business, to permit a cause which it may perhaps require several days to argue to be conducted to the end, only to be concluded by turning one of the parties out of Court on a technical objection, which ought to have been taken in time to obviate the necessity for the argument.

I think the appeal should be sustained with costs, and the cause sent back to the County Court, with directions to enter judgment for the plaintiff with costs.

McDONALD, J.—The learned Judge of the County Court decided that the note in question was controlled by the written paper which was signed by the parties at the time it was made, and no doubt he would have been right if the two papers were not consistent the one with the other. The error is in assuming that they are not, and it is easy to fall into that error in consequence of the word "condition" having been used in the agreement in a sense entirely different from the meaning of

the word. There is not, in that agreement, a single element of what constitutes a condition to the payment *absolutely* and *at all events*, of the amount mentioned in the promissory note in question *at its maturity*, and that is all that the law requires. It provides simply that if, *before* the maturity of the note, the plaintiff should have received the first instalment of the proceeds of the collateral security which he held, he would place the same to its credit, and that in the event of not receiving the instalments at all, or their being insufficient when received to meet the whole amount due upon the note, the balance of the sum secured by it should be paid by the defendant *at maturity;* and that the plaintiff, on being paid by the defendant, should assign to the defendant the collateral security held by him. This is perfectly plain and clearly consistent with the terms of the note. The defendant was the maker, and the plaintiff one of the endorsers, and, by the agreement, the other endorser was not to be called upon. If the maker, as is contended, was not to be called upon, why did not the agreement says so, as in the case of the endorser. The plaintiff paid the full amount and retired the note. Unlike the defendant, he had no pecuniary interest in the transaction but the promise of a small commission, which he never received. But the learned counsel for the defendant argues that the written agreement is a condition which controls the note, not because there is any inconsistency between the two in substance, but because the word "condition" happened to be used in the agreement, though clearly in an erroneous sense. If the parties to a promissory note, at the time of making it, should have signed a paper writing to the effect that it was given on "condition" that if the amount secured by it should be paid on the day of its maturity no action should be brought to enforce payment, it could not be contended that such writing would, in law, be a real condition controlling the note, though the word condition was used as in this case; but it would be otherwise if the argument of the learned counsel were good.

Oral evidence was received at the trial of what took place at the time of making the note, with a view to affect its operation, and the learned Judge of the County Court seems to have attached considerable importance to that evidence, but in this I think that he erred. "No mere oral agreement can

have any effect at law in controlling the instrument if contemporaneous with the making of it, for that would be to allow oral evidence to vary a written contract. Every bill or note," says PARKE, J., "imports two things, value received and an engagement to pay the amount. Evidence is admissible to deny the receipt of value, but not to vary the engagement." *Byles on Bills*, 6th Ed., 157, and cases there cited.

I attach not the slightest importance to the fact that, since the commencement of this suit, the plaintiff received some of the proceeds of the collateral security which he held. If that fact were properly brought before the Court, at the trial or since, the defendant would have been entitled to receive credit for the sums paid, and is now entitled to such credit if he takes the proper steps for that purpose; as he is, also, entitled to receive a transfer of the collateral security under the agreement as soon as he pays the whole amount of the note.

It is admitted that the bank stock and dividends of the estate of Almon & Mackintosh were to be collateral security in the hands of Jenkins. If so, there must have been some other security or indebtedness to Jenkins which the collateral security was designed to protect and further secure. But if the note in question was for the accommodation of Jenkins it would be no security at all, nor would it carry with it any obligation to pay an indebtedness. It would be absurd in such case to call the bank stock and dividends assigned to Jenkins collateral security, because there would have been nothing to which it could have been collateral. But, clearly, the note was not an accommodation note as between Jenkins and Bossom. If it were, why stipulate that Jenkins should assign to Bossom the collateral security received by him as soon as Bossom should pay the amount of the note?

It was suggested at the argument, though not urged by counsel, that it was not open to the appellant to question the judgment below on the ground that the Judge erred in holding that the agreement controlled the note, because, as it was suggested, that objection was not sufficiently particularized in the rule for appeal. I have carefully considered that point, and am clearly of opinion that the the grounds mentioned in the rule are quite specific enough. Even if the third ground were too general, the second is, in my opinion, quite sufficient.

It says; "Because the agreement put in by the defendant cannot control or affect the operation of the note as against defendant or change its effect."

I think the plaintiff is entitled to our judgment with costs.

WEATHERBE, J., delivered the following dissentient opinion:

In this case the facts detailed by the defendant are not in any material part contradicted, and even if so, the Judge below, I thought, put any question as to that matter at rest. Indeed, the writing in evidence, with plaintiff's testimony, to my mind rendered the case clear, and I could not understand why it was appealed to us, especially considering the very clear and full judgment of the learned Judge below, which would have seemed to me, but for the opinion of my brethren, to remain unassailed on a single point on the argument. Everything in question was conceded when it was admitted that the conditions of the agreement were to control and govern the alleged note as between the parties to the agreement, and destroy its character as a note, except, of course, in the hands of a third party,—the bank, for instance,—who could have enforced it to all intents and purposes against the defendant.

Bushell, the payee, required to send money to Scotland. He engaged with plaintiff to raise or advance the money, for which he was to place security in his hands, and besides to pay him the sum of twelve dollars as a commission. Defendant, who swears positively, as the Judge has found, that he had no interest in the transaction agreed for the accommodation of plaintiff and Bushell, the payee, to make the note in question. As plaintiff had himself agreed to advance this money, and was paid, or to be paid, which is the same thing, for doing so, it was not necessary to have it explained to us that the note was for *plaintiff's accommodation*. If not, for what was he paid? And for what was he to hold security? He agreed to advance the money and obtained ample security for the purpose, but it seems he had not the money, and to raise it to carry out this agreement, he was obliged to obtain this note to get the money in the bank.

Bushell owned bank stock and had an asset due from Almon & Mackintosh in excess of the amount which Jenkins was to advance. This bank stock and the debt due from Almon & Mackintosh were transferred to *Jenkins to hold as collateral security* for the loan which he was to make for reward to Bushell. Instead of advancing the money, it appears that he sold the bank stock, and with this, with the note with which Bossom had accommodated him, he got the whole sum which he had agreed himself to advance. The note was discounted in a bank, and this appears by the agreement to have been contemplated and admitted by plaintiff. If the sum due from Almon & Mackintosh transferred to Jenkins, or a portion of it, had been paid to Jenkins, he would with this have retired the note, and the agreement provides that Bushell, for whom Jenkins was raising the money, was not, in the event of non-payment by Almon & Mackintosh, to retire the note. The agreement provides that Jenkins should advance this and recoup himself out of the payment from Almon & Mackintosh. This he did. This in fact is all he ever did advance. The agreement goes on to provide that the dividend from Almon & Mackintosh is to be credited by Jenkins towards this very note, that is, towards the payment by him of said note. There can be no other meaning, and I could not understand that any other was urged. The agreement goes further, and if a doubt could in any way be raised, it must, it appears to me, be set at rest, when we read that when Jenkins has received *in full* the sum of five hundred and four dollars, he is *to transfer the security to Bossom.* Did this not shew conclusively that he was to pay the note?

SMITHERS *v.* SMITH.

WHERE defendant moved to set aside a judgment obtained in the Supreme Court, one of the grounds being that it was entered contrary to good faith, and plaintiff resisted the motion only to relieve himself of the charge of bad faith, which he did successfully, the defendant obtained time to plead paying the costs of plaintiff's opposition in so far as it related to the ground of bad faith.

Meagher moved to make absolute a rule to set aside a judgment in the Supreme Court on the ground, first, that the debt was paid, and secondly, that the judgment was entered contrary to good faith.

Ritchie, Q. C., contra.—There was no want of good faith. We don't object to the judgment being opened up.

YOUNG, C. J.—Mr. Meagher, why did you not plead?

Meagher.—Because we were going to pay the money into Court.

YOUNG, C. J.—It is a pure question of costs.

Ritchie, Q. C.—I claim costs. The stay of proceedings was only for forty days.

Meagher, in reply.—The suit was stayed by common consent and we should have had notice. We were ready on the third day to pay the money, and on the second judgment was entered. There is nothing due but the costs.

WEATHERBE, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

We think the defendant ought to be allowed to plead to this action, but upon terms. The defendant contended on the argument that in any event the costs only of the judgment below should be paid, the judgment standing as security. The judgment must so stand. We think, according to the practice in such cases, defendant should pay the costs of plaintiff's opposition to the motion so far only as resisting the making absolute the rule *nisi* on the ground that the judgment was entered up against good faith, because the plaintiff did not oppose the motion, except to relieve himself from that charge, which he did successfully. The defendant should have time to plead.

FULLMORE *v.* YOUNG.

PLAINTIFF agreed to haul logs for the defendant and deliver them on the bank or brow of a river and have the same surveyed, payment to be made by the middle of May then following. He and his son swore that the logs had been delivered at the proper place and put in the position most favorable to defendant. The defence then called five witnesses to prove that the logs were not placed in the proper position. Defendant, although contending that he was not bound to accept the logs, was about disposing of them to one Thompson, and called upon plaintiff with a view to carrying out that arrangement, but both Thompson and defendant swore that the plaintiff refused to deliver them without security. The plaintiff, although recalled, did not give any evidence to contradict this statement, but repeated his evidence as to the proper delivery in the first instance, which the Court held to be improperly received. Previous to the defendant being called he had, on cross-examination, denied having refused to deliver the logs without security, but the evidence as to this denial was regarded as unsatisfactory. There was no evidence that defendant had ever caused a survey of the logs, or that any survey made by plaintiff had been communicated to him. On these grounds the appeal from the judgment of the County Court in favor of plaintiff was sustained.

JAMES, J., dissenting.

THIS was an appeal from the County Court, in which the decision was in favor of the plaintiff. As the argument turned almost wholly on the evidence it is not reported.

WEATHERBE, J., now, (May 7th, 1880,) delivered the judgment of the Court:—

The agreement between the parties here is in writing, and the action is as set forth in the declaration for breach of the agreement.

The plaintiff agreed to haul and deliver logs to defendant on "the bank or brow" of a river, "and to have the same surveyed in the spring by a competent surveyor on the said brow, the same to be paid for in the middle of May then following."

The defendant's contention is that the logs were not placed on the brow of the river but were left at some distance from the proper place, so that they could not be put into the river without having them hauled. The plaintiff undertook to prove, as was necessary to support his declaration, that the logs were put in the proper place by himself and his son, who swore that they were put in the most favorable place for defendant. Plaintiff says some of them were about twenty feet away from the edge of the bank, and it appears others were placed against growing trees which would require to be cut to get the logs down the bank.

The defendant gave evidence in his own behalf and called *five other witnesses to show that the* logs were not placed in the proper position, and to shew the meaning of the term "brow" as applied to lumbering.

The defendant's position is very strong by this evidence, and I need not offer an opinion as to whether the weight of evidence is with him. I think on this very point evidence has been improperly admitted by the learned Judge below against the objection taken at the trial, and by the Attorney-General on the argument, and the finding may have turned on this very evidence. One necessary allegation in the declaration is that the logs were delivered according to the agreement, without proof of which plaintiff would have been nonsuited. He and his son support that position. After the defendant's witnesses had been called on this point and the defence was closed, the plaintiff insisted on giving evidence again on this subject, as appears by the minutes. The plaintiff was permitted to enter upon the proof of his case as to the delivery of the logs against the repeated objection of the defendant's counsel, and I cannot doubt that in this case, where the defendant had first controverted the plaintiff's position so successfully that a finding for him could not have been disturbed, the evidence improperly received weighed with the Judge below in turning the scale in plaintiff's favor.

There was another ground relied on at the argument, which it appears to me is against the plaintiff. The payment for the logs in question was not to be made by defendant till the middle of May following the delivery in the spring, as set forth in the agreement and declared on in the plaintiff's declaration. Although defendant contends that he was not bound to accept the logs where they were piled near the bank of the river, yet his statement is that he went with one Thompson, with whom he was negotiating a sale of the logs, for the purpose of having them then delivered. Thompson, who went into the woods to bring plaintiff out to the defendant, swears that on this occasion plaintiff expressed to him a refusal to deliver the logs. Nothing can be more explicit than his evidence. He says; "On the way I told plaintiff I had come with defendant to take charge of the logs. He said he would not let the logs go without he

had some security." There is no contradiction anywhere to this that I have been able to find. Thompson says that when plaintiff came to where defendant was at that time he heard him tell him the same thing, and the defendant positively swears that "plaintiff said he could not let me have the logs until I gave him security. When I was coming away he repeated it. I told plaintiff I had brought Thompson to take charge of the logs." Here was explicit evidence by defendant and an indisputable witness, and fit matter for contradiction, and though plaintiff is irregularly recalled to repeat and make good his former evidence, he does not attempt to contradict either defendant or the witness Thompson. It was urged at the argument that on his cross-examination by defendant's counsel, previous to the explicit and emphatic statements of Thompson, he had denied his refusal to deliver without security. I think we must hold his refusal to Thompson a refusal to defendant, and it is not urged that this is denied, and his alleged denial to defendant, although it would not avail, is most unsatisfactory and not very intelligible as reported. Plaintiff speaks of *more than one conversation* with defendant *on the day* that defendant and Thompson were at his house. The Judge below reports that defendant's counsel proposed to ask plaintiff if, at one of these conversations, *he would not let him have the logs until he paid him or gave him security.* After objection by his counsel is overruled, plaintiff answers, "I did not," which, if correctly reported, is ambiguous, to say the least of it. He goes on to say; "I never *asked* defendant for *security.* I did not ask him for *payment then. Thompson was not present all the time.* I did not tell defendant at any time *on that occasion* that I would not let him have the logs without security or payment. I did not tell him that at any time *that I remember.*" This is called a contradiction, but does it not rather shew that plaintiff cautiously abstained, before defendant and Thompson were called, from placing himself in conflict with them? And he declined afterwards to contradict them. Besides, a circumstance admitted by defendant and Thompson and sworn to by plaintiff seems to me very pertinent. Thompson went with defendant to plaintiff to get the logs. He was satisfied with them and wanted them.

This the plaintiff admits. He does not deny that he told Thompson he should not have the logs without security. I suppose no one can doubt that the reason he failed to get the logs was that plaintiff refused to deliver them without security. He did refuse to Thompson. Did he conceal this from defendant? Is it not striking that plaintiff offers no reason why the logs were not delivered to defendant when he went for them? There is another distinct ground raised on which it is contended the appeal should be supported. The agreement required plaintiff to have the logs surveyed by a competent surveyor on the brow where they were to be delivered. Plaintiff was bound to prove delivery or an offer to deliver these logs. If he had notified defendant of the survey it might have sufficed. All he says is that L. E. Thompson, the surveyor, "*purported* to come from defendant's to survey the logs." The "survey" is put in evidence by plaintiff, but I can find no evidence that defendant sent or knew of Thompson's surveying or that he had any kind of delivery or notice, or ever saw the "survey" or knew of its contents, or that he ever saw the logs, and plaintiff never delivered or offered to deliver the logs, or gave notice to defendant that they were ready for him. For these reasons we think the appeal must be sustained with costs.

JAMES, J., delivered the following dissentient opinion:—

I think the learned Judge who tried this cause in the County Court, and who has not given us the reasons for his decision, very probably decided it upon the ground of the credibility of the witnesses. I find many discrepancies in the evidence for the defence, quite sufficient in my opinion to raise the question whether it was a *bona fide* defence, and if the Judge who tried the cause was of the same opinion and decided upon the ground of his believing the plaintiff's witnesses, instead of the defendant and his witnesses, we ought not to disturb his judgment, except on very substantial grounds, because we have not, as he had, an opportunity of hearing how the witnesses gave their evidence.

The ground principally relied on at the argument against the plaintiff was that he told the defendant that he would not deliver the logs for the price of which he brings the action,

unless the defendant would give him security for the price. This is sworn to by the defendant and another witness who was to purchase the logs from him, and who was therefore an interested party. The plaintiff on the other hand positively denies that he refused to deliver the logs without security, although he admits that he asked what security he was to get for his money. His testimony is very direct and explicit, and there are several circumstances which induce me, as I have no doubt they induced the Judge of the County Court, to believe him in preference to the defendant and Thompson. The defendant himself admits that "the refusal of plaintiff to let the logs go without security was not the reason he did not take them." Again he admits, and his own witnesses prove, that he sent a surveyor to scale or measure the logs once at least if not twice after this conversation, and thirdly he was guilty of a dishonest attempt to bluff the plaintiff into abandoning his claim. The contract was in writing, and is clear and incapable of being misunderstood. The conversation alluded to, in which it is alleged that security was demanded, was about the middle of April, but on the 3rd of April he wrote the plaintiff as follows :—

PARRSBORO, *April 3rd, 1879.*

MR. JAMES FULMORE:

Sir,—On my arrival here to night I find yours of 29th. *I am not aware that I bargained with you to haul any logs for me.* Note what you say about Boyd. Much obliged for your offer to assist me. If I can sell the logs to Thompson & Pratt will take them. I go to Halifax to-morrow. Shall be back first of the week and will be up to see you, &c.

Respectfully,

B. YOUNG.

The words I have placed in italics are nothing less than a shameless falsehood, sufficient, in my opinion, to throw discredit upon his veracity as a witness. He appears to have failed in this and found it necessary to get up another defence. I think that if this case was not decided on the credibility of evidence it might properly have been with the same result.

I think the appeal should be dismissed with costs. I form this opinion without taking into consideration the evidence in rebuttal, a part of which was improperly admitted. I do not think the judgment below should be set aside on that ground, because the evidence improperly admitted was immaterial, and could not have affected the decision. It consists of a repetition in slightly different language by plaintiff of one or two statements as to the position of the logs which he had made on his former examination. I do not think they at all altered the effect of his former evidence, and I consider that they do not afford sufficient ground for sustaining the appeal. I think the appeal should be dismissed with costs.

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Held, that the objection to the form of appeal was fatal.

An order for appeal was afterwards granted by the County Court Judge, February 22nd, 1878, and the papers, certified March 7th, were filed March 11th, 1878.

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Held, that the Judge, being called on to exercise the powers of a jury, had the right to decide the question of fact as he did, giving due weight to the letter of plaintiff, and to the defendant's omission to reply to it, and that the appeal must be dismissed.

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See AWARD, Setting aside.

ARBITRATOR, Disqualification of.

An award was made by the arbitrator in favor of the defendant. Subsequently to the award being made it was discovered by the plaintiffs' counsel that the arbitrator, a Judge of the County Court, had, while at the Bar, prepared and read an affidavit opposing a motion made by plaintiffs' counsel for a reference. The arbitrator swore that he had had no recollection of this circumstance when he consented to act, and had never been consulted upon the merits of the cause, and that if he had opposed the motion referred to he had done so, not upon the defendant's retainer, nor as his counsel, but merely as a friendly act for the defendant's attorney.

Held, that the arbitrator was not disqualified.

McLelland et al. v. *Jennett*..... 52

ASSESSMENT.

See NEW GLASGOW, Assessment of.

———— IN CITY OF HALIFAX.

Under the laws in force in relation to the City of Halifax, December, 1877, *Held*, that vessels, the owner whereof resided and did business in the city, but which were not registered in Halifax and had never been in the Port of Halifax, were not assessable for city rates.

Kenny v. *City of Halifax*..... 39

ASSIGNEE intervening.

See INSOLVENT ACT OF 1875.

————, REMOVAL OF.

See INSOLVENT ACT OF 1875.

ATTORNEY, Power of to refer to Arbitration.

See Oakes v. *City of Halifax*..... 98

AUTHORITY OF AGENT, Implied warranty of.

See AGENT, Liability of.

AWARD, Enforcing obedience to.

The power conferred on the Court by Revised Statutes, chapter 109, section 22, to enforce obedience to an award made under a voluntary submission cannot be exercised by a Judge at Chambers.

SIR WILLIAM YOUNG, C. J., dissenting.

Collie v. *Moren*..... 427

————, SETTING ASIDE, &c.

Plaintiff brought action against the defendant Corporation for extras in consequence of deviations ordered by the City Engineer from the plan under which plaintiff had contracted to construct a sewer. A reference was entered into signed by the Recorder of the City and the attorney of the plaintiff, and made a rule of Court, whereby the matters

in dispute were left to two arbitrators named and a third to be by them chosen, the award to be made on or before the 1st day of May "or on such further or ulterior day as the said arbitrators, or any two of them, shall from time to time endorse on this order." Two extensions were endorsed by two of the arbitrators to the 1st July and the 1st September respectively, and on the 31st August a further extension to the 8th September was endorsed, signed, not by the arbitrators, but by the Recorder and the plaintiff's attorney. In the award, which was made on the 7th of September, the arbitrators set out that they had considered the matters referred to them under the annexed rule "and the endorsements thereon."

Held, on a motion to set aside the award, that the Recorder as the attorney of the Corporation had power to enter into the reference, but, *per* YOUNG, C. J., DESBARRES and MCDONALD, J J., (WEATHERBE, J., dissenting,) that the last enlargement not having been made by the arbitrators as required by the rule, but by the attorneys of the parties, was invalid, and that the assent of the arbitrators thereto could not give them jurisdiction; *per* YOUNG, C. J. and DESBARRES, J., that there had been no waiver of the irregularity, as nothing was done by the parties in the matter after the 1st of September; *per* MCDONALD, J., that the last enlargement was a void act and could not be waived.

Oakes v. *The City of Halifax* 98

BILL OF EXCHANGE, Alteration in.

Action was brought on a bill of exchange drawn by defendants. The bill, with the acceptance, was proved and read without objection, when plaintiff rested, whereupon defendants moved for nonsuit on the ground that there was no evidence of stamping, and because of an alteration unexplained on the face of the bill. Plaintiff was then recalled, and gave evidence as to double stamping and cancellation. Defendants gave evidence as to the alteration in the bill, contending that the date had been altered from 27th August to 17th August. After plaintiff had been called to rebut, the Judge proposed to submit to the jury the view that if the plaintiff had received the bill from the acceptors he would be entitled to recover, (because it would be impossible for the alteration to have taken place after the bill had left defendants' hands and before it reached the plaintiff and became an available bill,) but if from the defendants he could not. Plaintiff's counsel then said he would submit to a nonsuit, and the Judge gave him a rule to set it aside.

Held, that the view which the Judge had proposed to submit to the jury was incorrect, that plaintiff was not precluded from moving to set the nonsuit aside, and that the evidence as to alteration of the date and cancellation of the stamps was for the jury.

Domville v. *Davies et al*..... 159

———————, PRESENTMENT OF.

See PRESENTMENT OF, &c.

BILL OF LADING, Liability of shipowners under exceptions in.

Plaintiff shipped a quantity of iron on defendants' steamship, and took a bill of lading containing these words; "loss or damage resulting from * * * leakage, breakage, rust, decay, frost, rain, injury to or soiling of wrappers or packages, however caused, * * * excepted. The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss, or injury in the warehouse provided for that purpose on the company's wharf at Halifax, or sent to the public store, as the Collector at the Port of Halifax shall direct." The steamship proceeded, on her arrival in port, to the Railway Wharf, and in order to get at goods to be there discharged, the plaintiff's goods were taken out

and deposited in a shed on the wharf. Plaintiff was aware of the arrival of the ship, and paid the freight, but could not obtain delivery at the Railway Wharf, as the approach was unfit for teams, and the agent of the ship afterwards sent the goods in a lighter to Corbett's Wharf. The goods were injured by rain either on the Railway Wharf or in the shed. One of the plaintiff's witnesses gave evidence, not objected to, that a clerk of the agent for defendants had stated to him that the goods had come out of the ship in the rain, and the Judge who tried the cause, without a jury, found that the goods had been damaged in being landed, and gave judgment for plaintiff.

Held, that the landing of the goods at the Railway Wharf did not discharge the defendants, and that defendants were liable, notwithstanding the exceptions in the bill of lading, for the injury to the goods by rain, whether caused in the act of landing, or from the drippings of the shed over which plaintiff had no control.

WEATHERBE, J., (dissenting,) held that, the consignee not having taken the goods from alongside, they had been landed by the master and deposited in the company's warehouse at the consignee's risk of injury from rain, there being nothing in the bill of lading to limit the shipowner as to the place in the Port of Halifax at which the goods were to be landed before being deposited in the company's warehouse; and, further, that the verdict should be set aside because there was no legal evidence in support of the ground on which it was based, namely, that the goods were injured in the act of landing them.

Robertson v. *Dominion S. S. Co.* 149

BILL OF SALE, Fraudulent.

See FRAUDULENT TRANSFER.
See also STATUTE OF ELIZABETH.

BOND, Breach of condition.

During the pendency of a *certiorari* to remove a conviction of the defendant for selling intoxicating liquors contrary to law, defendant was again convicted and fined $22.80, inclusive of costs, which was reduced below $20 by a part payment, and action was brought in the County Court for the balance, on a bond conditioned that defendant would not sell during the pendency of the appeal from the first conviction. There was no evidence that he had sold liquor personally, but it appeared that liquor had been sold on the premises by a woman who was not shown to be the defendant's wife, child, or servant.

Held, that the breach of the condition of the bond had not been proved.

Q. Whether even a sale proved to have been made by a wife, child, or servant, would be a breach of the condition.

The Queen v. *McKenzie*..... 488

——— GIVEN BY PRISONER with surety, to obtain privilege of jail limits, Action on.

The defendant having been arrested on an execution, obtained the privilege of jail limits, as fixed by an order of Court under Revised Statutes, chapter 22, section 7, and gave a bond with a surety to the Sheriff, who assigned it to the plaintiff.

Held, that the bond could not be transferred by indorsement as a bail-bond so as to vest a right of action in the transferee, and that fourteen days' notice of action must be given by the assignee.

Q. As to legality of the bond.

Roue v. *Prendergast*..... 385

——— INSTEAD OF BAIL PIECE.

See PRACTICE, Bail.

BOND, Liability of heir on ancestor's.

See HEIR, Liability of, &c.

——— ON CERTIORARI.

See LICENSE LAW.

BREACH of condition of bond.

See LICENSE LAW
See also BOND, Breach of condition.

CAPIAS, set aside.

See AFFIDAVIT FOR CAPIAS.

CARRIERS.

See BILL OF LADING.
See also NEGLIGENCE.

CERTIFICATE of Registrar of Deeds, Proof of.

See REGISTRATION, Evidence of.

CERTIFYING appeal papers.

See APPEALS FROM COUNTY COURT 2, 8.

CERTIORARI.

1. Defendant, in a cause in the City Court, filed and served his grounds of defence, unsigned. The magistrate, after the plaintiff had been sworn, decided that the grounds were insufficient, and directed judgment by default to be entered. Defendant brought the cause up by writ of certiorari.

Held, that an appeal lay from the judgment below, and, further, that nothing could be done with the cause under the certiorari, as the matter was a summary one, and the summary jurisdiction of the Supreme Court had been taken away.
Eager v. *Carey*..... 49

2. Defendant, brought before Justices of the Peace on a charge of selling intoxicating liquors contrary to law, obtained a continuance after the investigation had been partially gone into, alleging the absence of a material witness. Before the day to which the trial was continued by the Justices he sued out a writ of *certiorari* to remove the proceedings to the Supreme Court. A rule *nisi* was obtained to quash the *certiorari*, which was served, not on the attorney whose name appeared on the præcipe for the writ of *certiorari*, but on his late partner. No attorney's name appeared on the writ itself. Nothing was done on the return day of the rule *nisi*, but afterwards an order was obtained from a Judge at Chambers to enlarge it, and have the cause placed on the docket for the then next term. On the argument of this rule the attorney of defendant stated that he did not appear to show cause, because the rule, as he contended, had not been served, and that, if the service was held to be good, he wanted an opportunity to appear.

Held, that the objection to the service of the rule had been waived by the attorney appearing, and that, no authority being shown to justify the issuing of the *certiorari* after the commencement of the investigation and before judgment, the grounds disclosed in the affidavit for *certiorari* being merely formal or frivolous, and the Supreme Court having no power to try the cause anew, as its summary jurisdiction had been abolished, the *certiorari* should be quashed and the cause remitted to the Justices.

Q. Whether the writ of *certiorari* was not defective for want of the name of an attorney.

WEATHERBE, J., (dissenting,) held that the original rule *nisi* had expired, and could only have been revived by a motion in term, a Judge at Chambers having no power to deal with the subject; and, further, that there had been no waiver of the want of service.

Blois v. *Richards*..... 203

3. Where the Assessment Roll was amended by the Court of Revision, a committee chosen from the Town Council, pursuant to a by-law, for the purpose of reviewing the assessment, and the action of the Court of Revision was confirmed by the Council.

Held, that a writ of certiorari, addressed to the Court of Revision and the Town Clerk, could be sustained, though otherwise if it had been addressed only to the Court of Revision.

Fraser & Bell v. *Town of New Glasgow*..... 250

See also ESTREATING RECOGNIZANCES.

————————, BOND FOR.

See BOND, Breach of condition.

CHAMBERS, Power of Judge at, to enforce award.

See AWARD, Enforcing, &c.

————————, POWER of Judge at, to grant rule *nisi* returnable in Term.

See PRACTICE, Rule *nisi*.

CHARGE.

New trial granted where the Judge made no formal charge to the jury and no charge was reported on his minutes.

Beales v. *Canada F. & M. Ins. Co*..... 401

CITY COURT, Appeal from and certiorari to.

See CERTIORARI, 1.

CITY OF HALIFAX, Liability of, for damage caused by rails of Street Railway Co.

See HALIFAX STREET RAILWAY CO., &c.

CLERICAL ERROR.

See APPEAL FROM COUNTY COURT, 8.

CLUB, Execution against member of.

See EXECUTION AGAINST, &c.

COMMISSIONERS for reappraisement, Costs before.

See COSTS.

COMMON CARRIERS.

See BILL OF LADING.

CONDITIONS in Insurance Policy, setting out in pleadings.

See PLEADINGS, Plea.

CONDITIONS OF BOND, Breach of.

See BOND, Breach of condition.
See also LICENSE LAW.

——————— ON PASSENGERS' TICKETS.

See NEGLIGENCE.

CONSIDERATION of deed.

See TRUSTS.

——————— FOR PROMISSORY NOTE.

See PROMISSORY NOTE.

CONSTRUCTION OF WILL.

See WILL, Construction of.

——————— OF AGREEMENT.

See AGREEMENT, Construction of.

CONSTRUCTIVE TOTAL LOSS.

See INSURANCE, MARINE.

CONTRACT, Evidence of.

Plaintiff was employed by the manager of the defendant company, in August, 1874, as an engineer, and on the 21st of September, 1874, the Manager wrote him that his services would not be required after the 26th of September, to which date his account was made up and paid. On October 6th, 1874, the Secretary, in London, wrote to the Manager, in Londonderry, instructing him to cancel the notice to leave above mentioned, and stating that it had been agreed that the plaintiff should receive pay from the date of his predecessor's departure at five dollars a day, "the term of his permanent service to be fixed by the Board when the salaries of other officers were discussed." This letter was shown to the plaintiff by a clerk of the company, who gave plaintiff a copy, which was compared with the original in the presence of the Manager.

Held, that secondary evidence of this letter, on non-production of the original, was properly admitted by the Judge, and that, with a letter of similar tenor, bearing the same date, and addressed to the persons conducting the company's establishment at Londonderry, it warranted the verdict found for the plaintiff on the basis of a permanent engagement.
Gray v. *Steel Co. of Canada*..... 434

CONVICTION under license law void, where defendant not present at trial and no affidavit of service of summons.

The Court made absolute a rule *nisi* for a *habeas corpus* where it appeared that the prisoner had been arrested on an execution for penalties under the License Laws, the Justices having proceeded with the cause in the absence of defendant without an affidavit of the service of summons, although on the hearing of the rule *nisi* it was made to appear that the summons had actually been served.
In re Donald McEachern 321

CORPORATION, Execution against member of.

See EXECUTION AGAINST, &c.

COSTS, Certiorari set aside without.

See Eayar v. *Carey* 49

———, VERDICT SET ASIDE WITHOUT.

See Morrison v. *Fishwick*. 59

——— OF APPEAL, &c., allowed to abide event of suit.

See Evans et al. v. *Foster* 66

——— OF RE-APPRAISEMENT OF LANDS.

Commissioners were appointed under an act to re-appraise lands taken for railway purposes in Digby County, and it was provided by the Act that the re-appraisement, "together with the costs heretofore incurred," should be a County charge.

Held, that the costs for services before the Commissioners for re-appraisement could not be taxed, as the Act provided only for those incurred prior to its passing.

In re Western Counties Railway—Ex parte Hardy..... 176

——— ON BILL IN EQUITY to compel re-conveyance.

See judgment in *Page* v. *Chambers* 231

———, RULE TO QUASH assessment made absolute without.

See Fraser & Bell v. *Town of New Glasgow*..... 250

———, RULE NISI DISCHARGED WITHOUT.

See Scott v. *Royal Halifax Yacht Club*..... 322

——— OF ARGUMENT ordered to abide event of suit.

See Gould v. *McGregor*..... 339

———, NEW TRIAL GRANTED WITHOUT.

See Beales v. *Canada F. & M. Ins. Co*..... 401

——— OF OPPOSING APPEAL DISALLOWED.

See Stevens v. *Overseers of Poor*.. 495

——— ON RULE ABSOLUTE.

Rule made absolute on payment of costs of resisting it, where one of the grounds was bad faith which the moving party failed to establish.

See Smithers v. *Smith*..... 553

——— ON PETITION for removal of assignee.

See INSOLVENT ACT OF 1875.

See also INSOLVENT DEBTORS, Relief of.

COUNTY COURT, Appeals from.

See APPEAL from County Court.

COUNTY COURT, Relief of Insolvent Debtors imprisoned under process out of.

See INSOLVENT DEBTORS, Relief of.

COUNTY SCHOOL RATE.

See DARTMOUTH, Liability of, &c.

COVENANT for title, action on.

In an action for breach of covenant for title contained in a deed from defendant to plaintiff, the plaintiff put in evidence a mortgage on which was endorsed what purported to be a certificate of registration. The execution of the mortgage was proved, but the certificate was not proved to have been signed by the proper officer, nor was it tendered as evidence independently of the mortgage.

Held, that as the plaintiff had had no notice of the mortgage, his title was good unless the mortgage was registered prior to the registration of the deed, and that in order to prove such registration it was necessary to show that the certificate had been signed by the proper officer, the mere production of a paper *purporting* to be a certificate not being sufficient under Revised Statutes, chapter 79, section 18.

Verdict for plaintiff set aside and new trial granted, costs of argument to abide the event.

Gould v. *McGregor* 339

CREDITOR, Definition of, under Insolvent Act of 1875.

See INSOLVENT ACT OF 1875.

DARTMOUTH, Liability of for County School Rates.

A *mandamus* was applied for, at the instance of the Sessions for the County of Halifax, to compel the Warden and Council of the town of Dartmouth to assess on the property of the town liable for assessment the sum of $15,976 for its proportion of County School rates for the years 1873–1878, under section 52 of the Education Act, Revised Statutes, chapter 32.

Held, that the Warden and Town Council ought to have assessed in each year for the proportion of the County School Assessment payable by the town, but that, in view of the act to amend the act to incorporate the town, (1877, chapter 40,) section 30 of which provided that the sum to be voted at the annual meeting of the town for the estimates, including ordinary and extraordinary expenses, should not exceed in any year the sum of $15,000, there was a difficulty in the way of issuing the *mandamus* as asked for.

Q. Whether there should have been a relator.

Per JAMES, J.—The city of Halifax is not exempted by chapter 32, Revised Statutes, from contribution to the County Shool rates, but is equally liable with the town of Dartmouth.

The Queen v. *Town Council of Dartmouth* 402

DEBTORS, Relief of Insolvent.

See INSOLVENT DEBTORS, &c.

DEED. Presumption arising from date of.

Defendant distrained on the 25th of March for a quarter's rent due by plaintiff, who brought an action of replevin, and put in evidence a deed from defendant to one Walsh, conveying away the reversion dated March 1st. The grantee in the deed, called by plaintiff, proved that

the deed was not delivered for some days, perhaps a fortnight or a month after the date it bore; and defendant said she did not know on what date she signed the deed, that it was some weeks after the 1st of March, that the grantee had not on the 25th of March got possession, and the plaintiff was still her tenant.

Held, that the presumption arising from the date of the deed had been rebutted, and it was the duty of the plaintiff to establish the fact of the delivery of the deed before the date of the distress to the satisfaction of the Judge who tried the cause without a jury, and that as he had not done so the verdict for defendant could not be disturbed.

WEATHERBE, J., *dubitante*.

Meagher v. *Coleman*..... 271

DFFAULT, Marking, after endorsing on writ name of relator.

See PRACTICE, Default.

————, RECORD OF JUDGMENT BY.

See PRACTICE, Record.

————, SETTING ASIDE.

See JUDGMENT.

DEFECT in Indictment.

See INDICTMENT.

DELIVERY OF DEED, Presumption as to.

See ESCROW.

———— GOODS.

See SALE OF GOODS.

DESERTION.

See HUSBAND AND WIFE.

DESTROYING INTOXICATING LIQUORS.

See TRESPASS.

DISASTER OF THE SEA.

See NEGLIGENCE.

DISCHARGE of Insolvent Debtor.

See INSOLVENT DEBTOR.

———— UNDER INSOLVENT ACT OF 1875.

See INSOLVENT ACT OF 1875.

DISQUALIFICATION of Judge.

The fact that the Insolvent was second cousin of the Judge's wife, held not to disqualify the Judge from dealing with the matter of an application by the insolvent for discharge.

In Re Creighton..... 211

DISTRESS for Rent.

Defendant, with a view to securing $50 rent due to him by one Scott, purchased a lot of furniture from the wife of Scott, in his absence, and removed it to his own premises. Previous to this Scott had given plaintiffs, from whom he had purchased the goods, a chattel mortgage on them as security for the price. Plaintiffs having demanded the goods from defendant, who refused to give them up except on payment of $50, brought an action of trover, to which defendant pleaded, setting up a lien for rent, and a distraint on the goods after their removal to his own house.

Held, that the right to distrain ceased upon the removal of the goods from the demised premises to defendant's house.

Fraser et al. v. *McFatridge*..... 28

See also DEED, Presumption, &c.

DOCKET, entry of Appeal Case upon.

See APPEAL FROM COUNTY COURT, 2.

DOUBLE RANKING on Insolvent Estates.

See INSOLVENT ACT OF 1875, 2.

DOUBLE STAMPING.

Defendant pleaded defective stamping and cancellation, to which plaintiffs did not reply, and on the trial the Cashier of the defendant Bank double-stamped the note and, in his evidence, stated that he had just then become aware of the defect of stamps.

Held, that the Cashier was the person whose knowledge was to be tested to determine the right to double-stamp, and that, (although *per* YOUNG, C. J., the more prudent course was to reply the double-stamping,) the want of a replication was not sufficient ground for a new trial, no objection for want of replication having been raised at the trial.

Merchants' Bank v *Sterling*..... 439

ENLARGEMENT of time for making award.

See AWARD, Setting aside.

——————— OF RULE.

See PRACTICE—Rule.

ESCAPE. Action against Sheriff for

See SHERIFF.

ESCROW.

Defendant agreed to purchase from one B. a lot of land subject to a mortgage of $6000, executed by B. and wife to plaintiff, and a second mortgage to other parties, paying off the second mortgage and executing a new mortgage to the plaintiff in lieu of the mortgage from B. and wife. The defendant's wife refused to execute the proposed mortgage to plaintiff, and it was signed and sealed by the defendant and placed, together with a bond for the amount, in the hands of defendant's solicitor, to be delivered to plaintiff so soon as the mortgage given by B. was released and the new mortgage by defendant was signed by his wife. The documents afterwards came into the possession of the plaintiff, but defendant's solicitor stated that he had never been authorized to deliver them on any other terms than those mentioned, and he could

not recollect when, how, or where plaintiff's solicitor had got them. The original mortgage made by B. and wife was foreclosed and the land bought in for less than the amount of the mortgage, by the plaintiff, who then brought his action on the covenant for payment in defendant's mortgage, with a count on the bond. Plaintiff on the trial produced his documents, and defendant was not examined to rebut the presumption of delivery. The learned Judge directed a nonsuit.

Held, that there was no evidence to go to a jury of a delivery of the documents declared on sufficient to make them operative as deeds, they having been delivered in the first instance as escrows.

JAMES, J., dissenting, held that the fact of the documents being in possession of plaintiff was presumptive proof of their delivery as deeds, and the burden was upon defendant to shew that they had never been delivered as such.

Cogswell v. *O'Connor* 513

ESTOPPEL.

County of Pictou held to be estopped by chapters 66 and 70, of the Acts of 1879, passed after hearing the Custos of the County by counsel before a Committee of the Legislature, from disputing the appraisement of lands taken for Eastern Extension.

In Re Pictou Railway Damages 448

ESTREATING RECOGNIZANCE.

See PRACTICE—Estreating, &c.

EVIDENCE of admissions.

See Robertson v. *Dominion S. S. Co* 149

——— OF ALTERATION and stamping of Bill of Exchange, for the jury.

See BILL OF EXCHANGE, Alteration in.

——— OF CONTRACT.

See CONTRACT, Evidence of.

——— OF JUDGMENT.

See RECORD.
See also PRACTICE—Record.

——— OF MINUTES OF HALIFAX CITY COUNCIL.

An action was brought against the defendant for his share of the expense of constructing a sewer on South Park Street, and a book was tendered in evidence as the Minute Book of the City Council containing the resolution authorizing the construction of the sewer, but was rejected. The City Clerk explained as to this book that notes were taken of the proceedings of the Council by himself when present, and in his absence by his assistant, and were afterwards transcribed more fully into the Minute Book from the pencil notes taken in the first instance, and certified by the Mayor at the following meeting of Council.

Held, that, as the resolution in question was a public official act of the City Council, registered in the book kept for the purpose, entered by the proper officer, and authenticated by the signature of the Mayor, the book should have been received in evidence.

City of Halifax v. *Romans* 265

EVIDENCE OF PRESENTMENT.

See PRESENTMENT of Promissory Note.

———— OF REGISTRATION OF MORTGAGE.

See REGISTRATION, Evidence of.

———— OF SEAWORTHINESS.

See INSURANCE, MARINE.

————, SECONDARY.

See CONTRACT, Evidence of.

———— TO SUPPORT ACTION OF TRESPASS.

See TRESPASS.

————, WEIGHT OF.

See WEIGHT OF EVIDENCE.

EXCEPTIONS in Bill of Lading.

See BILL OF LADING.

EXECUTION against member of a club.

An application having been made for leave to issue an execution against an individual member of the defendant club, an execution against the club having been returned unsatisfied,

Held, that section 13 of chapter 53, R. S., created no new liability on the part of members of a corporation, but merely provided that they should not be relieved from any liability that would have attached to them as partners, if unincorporated; that the members of defendant club would not, if unincorporated, have been liable as partners, and the statute was not intended to apply to such a corporation; and, even if this were not the case, that the plaintiff could not hold an individual member liable without proving that he was a member at the time of the return of the execution issued against the club.

Rule *nisi* for leave to issue execution discharged, but without costs.

Scott v. *Royal Halifax Yacht Club*..... 322

———— FOLLOWING CONVICTION for breach of License Laws.

See INTOXICATING LIQUORS.

———— STAYED.

See JUDGMENT, Right to enter.

EXTRA JURY PANEL.

See JURY, Extra panel.

FACT, Decision of County Court Judge as to questions of.

See APPEAL FROM COUNTY COURT, 3, 4.

FALSE REPRESENTATIONS as to solvency.

See REPLEVIN.

FINDING OF JUDGE as Jury.

See REPLEVIN.

FOREIGN COMPANY, Proceedings against.

See PRACTICE—Proceedings, &c.

FOREIGN LAW, Applicability of.

See PROMISSORY NOTE, Foreign Law.

FRAUDULENT overcharge in claim of loss.

See INSURANCE, FIRE, 1.

———— TRANSFER.

To an action of trover against defendant, as Sheriff, for goods seized under execution, defendant pleaded attacking a transfer from the execution debtor to the plaintiff, his father-in-law, as fraudulent. The transfer was by bill of sale made on the day on which the summons in the cause in which the execution was afterwards issued was served on the debtor. It was made without the knowledge or consent of the plaintiff, in the absence of any person representing him, and the consideration was a debt alleged to have been incurred some nine years before for board to the debtor's wife and children, and sundry articles and services such as a father might naturally contribute to his daughter's comfort without expectation of payment.

Held, that the verdict establishing fraud in the transfer could not be set aside as against evidence.

McDonald v. *Fergusson*..... 70

FUNCTUS OFFICIO, Judge, after decision.

See Woodill v. *LeCras*..... 7

HABEAS CORPUS.

The Court made absolute a rule *nisi* for a *habeas corpus* where it appeared that the prisoner had been arrested on an execution for penalties under the License Laws, the Justices having proceeded with the cause in the absence of defendant without an affidavit of the service of summons, although on the hearing of the rule *nisi* it was made to appear that the summons had actually been served.

In Re Donald McEachern..... 321

HALIFAX, Assessment in City of.

See ASSESSMENT in City of Halifax.

————, LIABILITY OF CITY OF, FOR COUNTY SCHOOL RATES.

See DARTMOUTH, Liability of, &c.

————, PROOF OF MINUTES OF CITY COUNCIL OF.

See EVIDENCE of Minutes, &c.

HALIFAX STREET RAILWAY Co., Liability of City for injury caused by rails of.

The Halifax Street Railway Company was incorporated by an act under which the City Corporation had power to refuse to permit rails to be laid, or to consent on such terms as they thought fit to impose. The company discontinued their operations, leaving the rails in many places protruding above the level of the streets, and about a year after they had ceased to operate their road the plaintiff's carriage and horses were seriously injured in consequence of one of the rails projecting from the street, the wooden sleepers to which it had been bolted being too much decayed to retain the fastenings. Defendants pleaded that the rails were in the exclusive possession of the City Railroad Company, that the accident had been caused by the passage of a heavy cannon disturbing the rails shortly previous, and that they had no notice of their defective condition. The verdict was for plaintiff.

Held, that under the justification pleaded it was necessary for the defendants to disclose the permission given to the company to lay the rails, and that the question as to the immediate cause of the accident and the want of notice had been disposed of by the verdict.

Per YOUNG, C. J., that the defendant corporation was bound to cover up the rails after the company had withdrawn from the field, and was liable for the damage resulting from its neglect.

Adams v. *City of Halifax*..... 344

HEIR, Liability of on bond of his ancestor.

An action was brought against the heir of an obligor on a bond whereby he bound himself and his heirs for the maintenance, among others, of the plaintiff.

Held, that the common law principle under which the heir, having assets from his ancestor, could be made liable on such a bond, was entirely inapplicable to the position in which the Statute of Distributions placed him in this Province; that the bond, although naming the heir, was not a charge on real estate, and that the action could not be sustained.

McLellan v. *McLellan*..... 80

HUSBAND AND WIFE.

In an action on a promissory note against a married woman defendant pleaded coverture, to which plaintiff replied, setting out an order for protection in consequence of desertion by her husband, made under Revised Statutes, chapter 86. Defendant rejoined that long before the making of the note she returned to her husband, and had since lived and co-habited with him, and was so living and co-habiting at the time of making the note, and the desertion had wholly ceased, as plaintiff well knew. The facts set out in the rejoinder were fully proved.

Held, sustaining the decision of JOHNSTONE, J., of the County Court, that the plaintiff could not recover.

WEATHERBE, J., dissenting.

Sinclair v. *Wakefield et al*..... 465

See also RULE to compel Magistrate.

IMPLIED WARRANTY of authority by Agent.

See AGENT, Liability of.

IMPRISONMENT under conviction for violating License Law.

See INTOXICATING LIQUORS, Imprisonment, &c.

INDICTMENT, Defect in.

The defendant was convicted on an indictment charging him with feloniously receiving, in the months of May and April, 1878, one pair of boots, the goods of W. H., three fishing rods, &c., the goods of A. F. C., and a quantity of silver-ware, &c., the property of J. R. J., then lately before stolen and carried away by a certain evil-disposed person, he, the said T. J. Quinn then well knowing the said goods and chattels to have been feloniously stolen.

Held that the defendant, having pleaded to the indictment, could not, in arrest of judgment, take the objection that the indictment was bad in law as charging him with having received certain goods which were not alleged to have been *feloniously* stolen, as the defect was aided by the verdict under chapter 29 of the Acts of 1869, section 32; and, further, that the fact of three different offences being charged in the indictment, if objectionable at all, could not be taken advantage of after verdict.

The Queen v. *Quinn* 139

INSOLVENT ACT OF 1875.

1. Plaintiffs became insolvent after an appeal was taken by defendant to this Court from the judgment of the County Court, setting aside pleas. The Court granted an order preventing the cause from being proceeded with unless plaintiffs should give security or the Assignee should intervene.

Evans et al. v. *Foster* 6

2. Claimants held the joint and several notes of Ladd, Porter & Co. as a firm, and of each of the two partners in their individual capacity, as security for a debt due by the firm.

Held, on appeal from the County Court, that under section 84 of the Insolvent Act of 1875 claimants were warranted in ranking on the firm estate and also on the private estate of the co-partners.

In Re Ladd et al., ex parte Hall et al 32

3. Under the Insolvent Act of 1875, a creditor for an amount less than $100 cannot oppose the confirmation of an insolvent's deed of composition and discharge. WEATHERBE, J., dissenting.

In Re Creighton 211

4. Judgment for plaintiff sustained where defendant pleaded a discharge in insolvency, and it appeared that the note sued on, of which the present plaintiff was the indorsee, had been included in the amount scheduled as the claim of the original payee, but no particulars of it were given, as provided by section 61 of the Insolvent Act of 1875. The plaintiff's name appeared in the schedule, but no amount was set opposite.

De Wolf v. *Neilly* 243

5. The power given to the Court or Judge by section 125 of the Insolvent Act of 1875, to remove an assignee, is confined to the case of an assignee disobeying an order made under said section, and does not extend to other misconduct on the part of the assignee, the general power of removal being committed to the creditors under section 29.

The Judge of the County Court removed an assignee and it appeared that an agreement had been made without the knowledge of the creditors generally, under which the Assignee conveyed the estate to his father, and co-partner, the partnership guaranteeing thirty-three and one-third per cent. of the insolvents' composition of forty per cent., and receiving from the insolvents $1000 for their guarantee,—the father to hold the estate as a security for the payment of the $1000. The Court reversed the decision of the County Court on the ground above indicated, but refused the assignee the costs of the appeal and argument, and of the proceedings in the County Court.

JAMES, J., dissenting as to the costs.

In Re Evans, ex parte Falconer 326

INSOLVENT DEBTORS, Relief of.

In an action against a Sheriff for releasing a debtor imprisoned under process issued out of the County Court, an order having been made for his discharge by Commissioners for the Relief of Insolvent Debtors, the County Court decided in favor of the plaintiffs on the ground that previous to April 4th, 1878, such commissioners had no power to relieve in the case of executions out of the County Court. After the argument of the appeal from this decision, and before judgment, the Act of 1878 "for the Relief of Debtors imprisoned under process issued out of the County Court," was passed, one clause of which provided that no action should be taken *or sustained* by reason of such proceedings being void, (*i. e.*, proceedings before the commissioners taken previous to this Act.)

Held, that this Act was retrospective and the action could not be sustained, but that the judgment for defendant should be without costs, as the action had been rightly brought in the first instance.

The Court refused to grant a re-argument applied for on the grounds that the Act of 1878 was *ultra vires* and that it could not be construed retrospectively.

Cutlip et al. v. *Caldwell* 74

INSURANCE, FIRE.

1. Plaintiffs, in their statement of loss by fire, claimed that a building constituting part of the property destroyed was worth $2000. The evidence as to the real value of the building was such as to convince the Court that it was not worth when new more than $800 to $1000, and that at the time of the fire it was not worth more than $500.

Held, that the verdict, which was the second verdict in favor of the plaintiffs, must be set aside on the ground of fraudulent overcharge in the claim of loss,—the policy providing that the insured should forfeit all remedies if guilty of "any wilful mis-statement with intent to deceive the Company as to the amount of the loss."

McLeod et al. v. *Citizens' Insurance Co* 21

2. Defendants, in an action on a policy of insurance, pleaded, with fifteen other pleas, *nunquam indebitatus*, and two pleas alleging that the action had not been brought within six months, as required by a condition in the policy; but there was no plea denying the making of the policy. Plaintiff, relying on the want of a plea traversing the making of the policy, did not put it in proof, and defendants failed to produce it to prove the condition.

Held, that the plaintiff could not be put to the proof of the policy by the plea of *nunquam indebitatus*, but that, under such plea, though perhaps demurrable, the defendants might have given evidence of the alleged condition, had they been in a position to do so.

Q. Whether the plea of *nunquam indebitatus* was not bad.

Barrett v. *The Isolated Risk Insurance Co* 218

3. H. P. represented himself to be the agent of the defendant company, employing sub-agents, effecting policies and paying losses in their name, and it was stated by one of the professed sub-agents of the company that H. P. was the agent. This was not contradicted by the alleged agent, whose evidence was read at the trial, and who admitted that he had acted as agent of the company and had sent the preliminary proofs in this case to the company.

Held, that this was sufficient proof of agency.

The sixth condition of the policy required the insured to give notice of loss in writing forthwith to the agent of the corporation, at his office in Halifax, and to furnish preliminary proof to the corporation within fifteen days. The fire took place January 17th. Plaintiff, residing at Sydney, C. B., where the insured property was situated, went on the next day to the sub-agents, who sent a telegram to the agent, and on January 23rd plaintiff sent the agent a written notice, which he received January 27th. The preliminary proofs were prepared by the sub-agents

January 22nd and received by the agent "early in February,"—the agent could not tell the exact date.

Held, that the notice of loss was sufficient, and that the jury might fairly presume that the preliminary proof had been sent in within fifteen days, which did not expire until February 2nd.

The fourth condition provided that no insurance should be considered in force until the premium was actually paid, and that insurance should expire unless the premium was paid on or before the commencement of the succeeding term. The renewal premium was not actually paid till some days after the commencement of the term, which was from Jan. 1st, '75, to January 1st, '76, but in December, '74, a post-card was sent to plaintiff by the sub-agents at Sydney, reminding him that his policy would expire January 1st, and adding, "if you wish it renewed please notify us on or before that day." Plaintiff notified them that he wished it renewed and received from them a letter dated January, 1875, stating that the policy was marked renewed. The letter, with the exception of the date and number of the policy, was in print, shewing a custom of of the office thus to mark policies renewed before payment of renewal premiums, and one of the firm of sub-agents at Sydney swore that such a practice had been recognized by the agent at Halifax, and that renewals so effected were understood to stand subject to the agent's disapproval, the sub-agents charging themselves with the amount of the premium in account with the agent at Halifax. This witness stated further that the condition as to payment of renewal premiums was never attended to, and on the previous renewal of this policy the premium had been accepted after the commencement of the term.

Held, that the contract for insurance was valid, the condition having been waived

Peppit v. *North British & Mercantile Insurance Co*..... 219

INSURANCE, MARINE.

1. The application for marine insurance described plaintiff's vessel as "A 1," the fact being that she was classed "A 1" American Lloyds. Defendants pleaded in effect that the vessel was unseaworthy, and that she "had been misrepresented to be a sea-going ship classed 'A 1' in Lloyds, or some similar institution for the classing of shipping, whereas said vessel was not a sea-going ship, but was a centre-board canal-boat, built to navigate inland waters only, and was not classed 'A 1' in Lloyds or any other similar institution, but was of inferior quality and of no class whatever." Evidence was given that she was "perfectly tight two days only after leaving port," and also to shew that the classification of "A 1" American Lloyds did not give an ocean-going vessel the same character as the corresponding class in English Lloyds. The weight of evidence on this point appeared to be with the plaintiffs, and, as to unseaworthiness, the presumption arising from the condition of the vessel shortly after leaving port, as above described, was rebutted by clear evidence that she was "in good condition and seaworthy when she sailed." The Court upheld the verdict for the plaintiffs.

Ewart et al. v. *Merchants' Marine Insurance Co*..... 168

2. Plaintiff's vessel was stranded, July 6th, on the western side of Cape George in a sudden and violent gale, and on the following morning lay on her side, exposed to all winds from the north, east and south, on a beach composed of sand and boulders, with a reef of rocks outside over which she had beaten at high water on the previous night. The master employed surveyors, who found her to be hogged and strained, with butts started, rudder unshipped, anchor and chain gone, sails and rigging damaged, and the tide flowing in and out through an injury in her bottom, the extent of which could not be ascertained, and, on their recommendation, confirmed by the judgment of the master, she was advertized on the 7th and sold on the 11th of July for $200. In a few days she was repaired, and kept afloat for eighteen months, when she went on shore, uninsured, and, although she might have been got off

and repaired, the owners did not think her worth the expense. It appeared that she could never be repaired so as to be tight, although she had been put on the marine slip three times for the purpose. The captain went to Antigonish, which was twenty miles distant, on July 7th, noted his protest, and telegraphed to the agents of the vessel in Halifax, who informed defendant's company, but did not give notice of abandonment. The company telegraphed to their agent at Antigonish, who on the 8th July proceeded to the wreck and examined her, and told the captain "she was a hard looking sight to try and get off." The agent promised the captain that he would communicate with the insurers by letter and telegraph, and would be present at the sale. He telegraphed, and could have been instructed by telegraph in time for the sale, but the insurers wrote instead of telegraphing, and the agent did not attend the sale.

Held, that the plaintiff was entitled to recover for a total loss without notice of abandonment.

WEATHERBE, J., dissenting.

Gallagher v. *Taylor* 279

3. Plaintiff's policy of marine insurance contained a condition that if the assured had made any other insurance on the property prior to the date of the policy the insurers would be answerable only for so much as the amount of such prior insurance should be deficient towards fully covering the premises thereby insured. It appeared to the Court that under prior insurances the plaintiff had been fully indemnified, and the verdict for the plaintiff was accordingly set aside with costs.

Kenny v. *Union Marine Insurance Co* 313

4. Plaintiff brought action on a policy of insurance on goods supplied for a trading voyage. The vessel was wrecked on the Labrador coast at a place where there was no boat, no wharf, and no means of saving the goods, with the exception of one vessel, which had a cargo of her own, and could not be compelled to remain to protect the property. To leave the goods in the vessel all winter would have been extremely hazardous, and the master sold them without notice.

Held, that, considering all the circumstances, the sale was justifiable, and therefore notice of abandonment was not necessary.

Plaintiff was permitted at the trial to amend his declaration by alleging the interest in the insurance to be in one M. along with the others originally named.

Held, that the Judge had the right to allow the amendment in his discretion.

Ramsey v. *Providence Washington Insurance Co* 393

INSURANCE, PLEADING CONDITIONS IN POLICY OF.

See PLEADINGS—Plea.

INTOXICATING LIQUORS.

See HABEAS CORPUS.

See also LICENSE LAW.

———————, DESTRUCTION OF.

See TRESPASS.

———————, IMPRISONMENT under conviction for violating law relating to sale of.

By an act of the Provincial Legislature a Town Court was constituted for the incorporated Town of Truro, to be presided over by the Recorder or Stipendiary Magistrate, the two offices being filled by the same person. It was enacted that the Town Court should have and possess

all the powers in civil matters within the municipality conferred upon one or more Justices of the Peace or Stipendiary or Police Magistrate by any act of the Province. The prisoner was convicted of a violation of the License Laws by selling intoxicating liquors contrary to law, as for a third offence, and while in jail was again convicted of a fourth offence, the summonses issuing out of the Town Court, and the executions, in the form R. S., chapter 75, schedule F, being signed by the Stipendiary Magistrate as the officer presiding in that Court. On a motion for a *habeas corpus*,

Held, that the matter came within the jurisdiction of the Town Court as above defined, and that the imprisonment was lawful, although the execution specified no definite period.

WEATHERBE, J., dissenting.

In Re Simon Fraser 354

ISSUE.

See PRACTICE—Issue.

JAIL LIMITS, Bond to secure privilege of.

See BOND, given by prisoner, &c.

JOINT TENANTS, under Will.

See WILL, Construction of.

JUDGE, Disqualification of.

See Disqualification of Judge.

———, DUTY OF to report charge.

New trial granted where the Judge made no formal charge to the jury and no charge was reported on his minutes.

Beales v. *Canada Fire & Marine Ins. Co* 401

———, JUDGMENT OF, TRYING CAUSE WITHOUT JURY.

See WEIGHT OF EVIDENCE.

———, POWER OF, AT CHAMBERS, TO ENFORCE AWARD.

See AWARD, Enforcing, &c.

———, POWER OF, to grant rule *nisi* at Chambers returnable in Term.

See PRACTICE—Rule *nisi*.

JUDGES, Power of to order extra Jury Panel.

See JURY, Extra Panel.

JUDGMENT, Right to enter.

Plaintiff recovered a verdict on a policy of insurance for $2000, subject to the opinion of the Court. After the argument of a rule *nisi* and before judgment pronounced on the rule, the parties entered into negotiations for a settlement, the result of which was that plaintiff, about a fortnight before the delivery of judgment, accepted $1000 in full of his claim, and delivered up his policy to the company. Judgment was afterwards given in his favor for the full amount of the claim, and a rule *nisi* was taken by defendants to compel the plaintiff to file a discontinuance,

or, in the alternative, that all proceedings should be stayed. The Court refused to interfere with the plaintiff's common law right to enter judgment, but stayed execution for thirty days, that defendants might take such steps as they might be advised.

Peppit v. *North British Insurance Co*..... 486

JUDGMENT, Setting aside.

Where defendant moved to set aside a judgment obtained in the Supreme Court, one of the grounds being that it was entered contrary to good faith, and plaintiff resisted the motion only to relieve himself of the charge of bad faith, which he did successfully, the defendant obtained time to plead paying the costs of plaintiff's opposition in so far as it related to the ground of bad faith.

Smithers v. *Smith*..... 555

JURISDICTION in case of *certiorari*.

See CERTIORARI.

——— OF TOWN COURT OF TRURO.

See INTOXICATING LIQUORS, imprisonment, &c.

JURY, Extra panel.

The prisoner was tried by a jury called from an extra panel, the order for which, made under R. S., cap. 92, sec. 37, was signed by only three of the Judges.

Held, that the order was valid although not signed by a majority of the Judges.

The Queen v. *Quinn*..... 129

LETTER, Omission to reply to.

See APPEAL FROM COUNTY COURT 3.

LIABILITY of Overseers of Poor.

See OVERSEERS OF POOR.

——— OF PROCTOR FOR REGISTRAR'S FEES.

See PROCTOR, Liability of, &c.

LICENSE LAW.

During the pendency of a writ of *certiorari* to remove a conviction of the defendant for selling intoxicating liquors contrary to law, defendant was again convicted and fined $22.80, inclusive of costs, which was reduced below $20 by a part payment, and action was brought in the County Court for the balance on a bond conditioned that defendant would not sell during the pendency of the appeal from the first conviction. There was no evidence that he had sold liquor personally, but it appeared that liquor had been sold on the premises by a woman who was not shewn to be defendant's wife, child, or servant.

Held, that the breach of the condition of the bond had not been proved.

Q. Whether even a sale proved to have been made by a wife, child, or servant would be a breach of the condition.

The Queen v. *McKenzie*..... 488

See also HABEAS CORPUS.

See also INTOXICATING LIQUORS.

LICENSE LAW, Conviction under, quashed.

See APPEAL FROM COUNTY COURTS.

LIEN for rent.

See DISTRESS for rent.

LLOYDS' CLASSIFICATION.

See INSURANCE, MARINE, 1.

MAGISTRATE, Compelling to act.

See RULE TO COMPEL, &c.

MAGISTRATES' CAPIAS, Affidavit for.

See AFFIDAVIT FOR CAPIAS.

MANDAMUS.

See DARTMOUTH, Liability of, &c.

MARRIED WOMEN, Order for protection of.

See HUSBAND AND WIFE.

MINUTES of City Council of Halifax, Proof of.

See EVIDENCE of Minutes, &c.

——— OF JUDGE'S CHARGE.

See Beales v. *Canada F. & M. Ins. Co*..... 401

MISREPRESENTATION.

See INSURANCE, MARINE, 1.

NEGLIGENCE.

Plaintiff brought action to recover damages for injuries caused to her luggage on defendant's steamship in consequence of the breaking of a dummy or side-light, which, although not constructed according to the latest patents, was such as had been in use for vessels of that class. The ticket for the passage was issued under the Imperial Act, 18 & 19 Vic., chapter 119, which required conditions forming part of the contract to appear on the face. On the face of plaintiff's ticket was a direction to "see back of ticket," and on the back was printed a condition that defendant was not to be responsible for loss resulting from shipwreck or disaster of the sea. The carpenter swore that he had examined the dummy every day before the day when the injury was discovered, and had seen it at ten o'clock on the morning of that day. The only evidence of negligence on his part consisted of unsworn statements of the captain and other officers, as testified to by one of the witnesses, that the damage had been caused by the negligence of the officer whose duty it was to visit and inspect the luggage room.

Held, that the plaintiff was bound by the condition, and that the verdict for plaintiff, based upon the imperfect construction of the dummy and the negligence of the defendant's servant, must be set aside.

Wood v. *Allan*..... 477

See also BILL OF LADING.

See also HALIFAX STREET RAILWAY CO., &c.

NEW GLASGOW, Assessment in Town of.

The act incorporating the Town of New Glasgow empowered the corporation to vote, assess, collect, receive, appropriate and pay the moneys required for poor rates and all other rates, and conferred upon the corporation all the powers theretofore vested in the Sessions, Grand Jury and Town Meeting, with power to make by-laws substituting assessment in lieu of statute labor, and to make all rules necessary for the creating and conduct of the Police and Municipal Court of the town, and for regulating the mode of assessment and levying the same, and generally for all purposes connected with or affecting the internal management or government of the town.

Held, that the corporation could not, under these provisions, establish a Court of Appeal and Revision, with reference to assessments, with power to administer oaths.

Under a by-law of the Town of New Glasgow, providing that all real and personal property in the town should be liable to taxation,

Held, that insurance and bank stocks owned by residents of the town, in companies not doing business in the town, were not liable to assessment.

Fraser & Bell v. *Town of New Glasgow*..... 250

NONSUIT.

See PRACTICE—Nonsuit.

———— SET ASIDE on account of improper rejection of evidence.

See Jost v. *Churchwardens, &c., of St. George's*.... 451

————, VOLUNTARY, NOT SET ASIDE.

See PRACTICE—Nonsuit.

NOTARIAL PROTEST.

See PRESENTMENT OF BILL.

———— SEAL.

See PRESENTMENT OF BILL.

NOTICE in action by Assignee on bond to secure privilege of jail limits.

See BOND, given by prisoner, &c.

———— OF ABANDONMENT.

See INSURANCE, MARINE 2, 4.

———— OF LOSS.

See INSURANCE, FIRE 3.

———— TO OVERSEERS OF POOR.

See OVERSEERS OF POOR—1.

NUNC PRO TUNC, Refusal to allow record to be filed.

See RECORD.

ORDER FOR APPEAL.

See APPEAL FROM COUNTY COURT 1, 6, 7, 8.

ORDER for protection of married woman, Continuance of.

See HUSBAND AND WIFE.

OVERCHARGE in claim of loss by fire.

See INSURANCE, FIRE 1.

OVERSEERS OF POOR.

1. Plaintiff brought his action in the County Court to recover an amount expended for the support of a female pauper and her illegitimate child, but failed to shew when notice was given and request made to the Overseers. The judgment of the County Court was for defendants.

Held, that the appeal must be disallowed, as there was no evidence of the date of notice, from which the Court could have said how much plaintiff was entitled to recover, but that the costs of opposing the appeal should not be allowed, as the County Court had decided on different and untenable grounds.

Held, also, that the fact of the pauper refusing to make an affidavit as to the paternity of the child, was not sufficient to warrant the Overseers in withholding relief or refusing to reimburse the plaintiff, by whom it had been afforded.

Stevens v. *Overseers of the Poor*..... 495

2. Plaintiff claimed under an agreement made by one of the Overseers of Poor who had been deputed by the other Overseers to attend to the request of the plaintiff's father, claiming to be a pauper, who required medicine and attendance in his last illness. It appeared that plaintiff was a person of no means whatever, but that one of the pauper's other sons, after the contract was made with plaintiff, notified the plaintiff of his willingness to support his father at his house, but at the time said notice was given the pauper was not in a condition to be removed.

Held, that defendants, the successors of the Overseers who had dealt with the matter in the first instance, were liable under the contract, although the Town Meeting had declined to vote a sum to meet the charge, their remedy being by amercement of the Township.

Semble, that, apart from the contract, the Overseers would be liable, under Revised Statutes, chapter 33, for attendance furnished by the plaintiff, being a person not liable by law for the pauper's support, as he was not of sufficient ability to relieve and maintain him at his own charge; and no direction had been given by the Sessions that he should do so. (Sections 11 and 18.)

Munro v. *Overseers of the Poor, Wallace*..... 501

OVERVALUATION.

See INSURANCE, FIRE 1.

PARTIES to Promissory Note.

See PROMISSORY NOTE.

PAUPER, Support of.

See OVERSEERS OF POOR.

——— REFUSING TO DISCLOSE PATERNITY OF ILLEGITIMATE CHILD.

See OVERSEERS OF POOR—1.

PAYMENT by Promissory Note.

See ACCEPTANCE OF NOTE AS PAYMENT.

PAYMENT, Priority of.

The note sued on, with others, was given to M. to assist him in his business in Halifax, and was endorsed by him in blank and given to the plaintiffs, not for discount, but to be held by them as security for advances. Accounts were put in showing advances amounting to $95,000, and resulting in a balance of $18,000 due by M. to the plaintiffs. The notes were not mentioned in the accounts at all.

Held, that the equitable doctrine as to priority of payments did not apply so as to discharge the notes as elder obligations.

Merchants' Bank v. *Sterling*..... 439

PLEADINGS.

Plea.

1. Defendants, in an action on a policy of insurance, pleaded, with fifteen other pleas, *nunquam indebitatus*, and two pleas alleging that the action had not been brought within six months, as required by a condition in the policy; but there was no plea of denying the making of the policy. Plaintiff, relying on the want of a plea traversing the making of the policy, did not put it in proof, and defendants failed to produce it to prove the condition.

Held, that the plaintiff could not be put to the proof of the policy by the plea of *nunquam indebitatus*, but that, under such plea, though perhaps demurrable, the defendants might have given evidence of the alleged condition, had they been in a position to do so.

Q. Whether the plea of *nunquam indebitatus* was not bad.

Barrett v. *Isolated Risk Insurance Co*..... 215

2. Plaintiff, in an action on a policy of insurance, referred in his declaration to "the conditions endorsed on the policy, and which constituted the basis of said insurance," but he only set out one condition referring to notice and proof of loss, alleging that it was the only condition material to his cause of action, and he averred general performance of conditions. Defendant pleaded that the action was not commenced within six months after alleged loss, and the same was not sustainable under the said conditions endorsed on said policy; and, by another plea, that by said policy the loss, if any, was made payable to one Anderson, and before the alleged loss the defendant Company, by notice to said Anderson, terminated the insurance, and said Anderson agreed to terminate the insurance and deliver up the policy to be cancelled.

Held, that these pleas were bad under sections 151 and 152 of the Practice Act, as they did not allege or show that the policy contained any conditions requiring the action to be brought within six months, or enabling the Company to terminate the insurance by notice; and that the objections to the pleas were not such as could be obviated by amending them under section 124.

Caldwell v. *Stadacona Fire & Life Insurance Co*..... 259

3. *Held*, in an action of trover, that, under R. S., cap. 94, secs. 164 and 166, defendant could not, under a plea denying the conversion, avail himself of the defence that the goods were not the property of the plaintiff.

Morrison v. *Fishwick*..... 59

Plea of Discharge under Insolvent Act of 1875.

See Insolvent Act of 1875, 4.

Replication of double stamping.

See Double Stamping.

POSSESSION of goods in warehouse.

See Morrison v. *Fishwick* 59

PRACTICE.

AMENDMENT at trial.

Plaintiff was permitted at the trial to amend his declaration by alleging the interest in the insurance to be in one M. along with the others originally named in an action on a policy of insurance.

Held, that the Judge had the right to allow the amendment in his discretion.

Rumsey v. *Providence W. Ins. Co.* 393

AMENDMENT OF RULE on argument.

A rule taken "on reading the Judge's minutes" was allowed to be amended at the argument by inserting a reference to all the papers.

Gray v. *Steel Co. of Canada* 434

APPEAL not entered on docket.

See APPEAL from County Court, 2.

APPEAL, Rule for.

See APPEAL from County Court, 1, 6, 7, 8.

AWARD, Enforcing obedience to.

See AWARD, Enforcing, &c.

BAIL ON RULE NISI under statute.

Rule *nisi* under the statute for a new trial discharged on the ground that a bond was filed instead of a bail-piece.

McKenna v. *Tracy*. 392

CERTIFIED PAPERS, Filing of, in appeal cases.

See APPEAL from County Court 2, 8.

DEFAULT.

In an action on a *certiorari* bond, under chapter 75, Revised Statutes, "Of Licenses," schedule E, the defendant obtained an order *nisi* for the endorsation on the writ of the name of a person to be liable for costs, under the practice established by *The Queen* v. *McKarcher*, 3 R. & C., 337. Before the rule was made absolute, the plaintiff endorsed the name of the Clerk of License, and gave the defendant notice. A rule was afterwards obtained making the rule *nisi* absolute and giving the defendant ten days to plead. Plaintiff, after the rule was made absolute, endorsed the name of the Clerk of License a second time, but did not give the defendant notice of the second endorsation, and, after the expiration of ten days, marked a default for want of a plea.

Held, that the default had been regularly marked.

Q. As to the practice established by *The Queen* v. *McKarcher*, 3 R. & C., 337.

The Queen v. *Carter*..... 307

ENTERING APPEAL ON DOCKET.

See APPEAL from County Court, 2.

ESTREATING RECOGNIZANCE.

Defendant, having been convicted in the Police Court of an assault, entered into a recognizance with two sureties to keep the Peace. Afterwards he was convicted of a second assault, and the Attorney General had the proceedings brought up by certiorari, whereupon,

The COURT, holding that the mode of proceeding in England to estreat recognizances was wholly inapplicable to this Province, sanctioned the course pursued in *The Queen* v. *Thompson*, Thomson's R., 9.
The Queen v. *Brown* 51

EXTRA JURY PANEL.

See JURY, Extra panel.

ISSUE.

The Court will on the argument be governed as to the pleadings by the issue used at the trial.
Peppit v. *N. B. & Mercantile Ins. Co.* 219

JUDGMENT, right to enter.

See JUDGMENT, right to enter

NONSUIT.

1. Action was brought on a bill of exchange drawn by defendants. The bill, with the acceptance, was proved and read without objection, when plaintiff rested, whereupon defendant moved for nonsuit on the ground that there was no evidence of stamping, and because of an alteration unexplained on the face of the bill. Plaintiff was then recalled, and gave evidence as to double stamping and cancellation. Defendant gave evidence as to the alteration in the bill, contending that the date had been altered from the 27th August to the 17th August. After plaintiff had been recalled to rebut, the Judge proposed to submit to the jury the view that if the plaintiff had received the bill from the acceptors he would be entitled to recover, (because it would be impossible for the alteration to have taken place after the bill had left defendant's hands and before it reached the plaintiff and became an available bill,) but if from the defendants he could not. Plaintiff's counsel then said he would submit to a nonsuit, and the Judge gave him a rule to set it aside.

Held, that the view which the Judge had proposed to submit to the jury was incorrect, that plaintiff was not precluded from moving to set the nonsuit aside, and that the evidence as to alteration of the date and cancellation of the stamps was for the jury.
Domville v. *Davies et al.* 159

2. The Judge having refused a nonsuit, plaintiff consented to become nonsuit on condition that the Judge would grant leave to set it aside, to which the Judge agreed, reserving the question whether he had legal power to do so.

Held, that the plaintiff having consented to the nonsuit, could not afterwards move to set it aside.
Smith v. *McDonald* 245

ORDER FOR APPEAL.

See APPEAL from County Court 1, 6, 7, 8.

PROCEEDINGS against foreign company.

An application was made by Wallace to rescind an order made for the payment to the plaintiffs of the surplus proceeds of a sale of defendants' land on the ground that the judgment under which plaintiffs

claimed the proceeds, and which was taken by default, was based on notes given without any consideration. Wallace had taken proceedings against the defendants, under R. S., chap. 97, sec 26, as a foreign company doing business in this Province by an agent, but the agent had not been served.

Held, that for want of service on the agent Wallace was not in a position to make the application.

Almon & Mackintosh v. *Cole Harbor Land Co.* 396

RECORD.

Defendant put in as evidence of the judgment the so-called "record by default" in the form No. 11 of schedule A, cap, 94, R. S., signed by the plaintiff's attorney.

Held, that this was legal evidence of a judgment.

McDonald v. *Fergusson*..... 70

See supra AMENDMENT.

See also RECORD.

RULE, Enlargement of.

See CERTIORARI, 2.

RULE FOR APPEAL from County Court.

See APPEAL from COUNTY COURT, 1, 6, 7, 8.

RULE NISI at Chambers returnable in term.

Held, (WRATHERBE, J., dissenting,) that notwithstanding the omission from R S., 4th series, cap 94, sec. 5, of the words contained in R. S., 3rd series, cap. 134, sec. 238, a Judge at Chambers can make a rule *nisi* returnable in term.

Oakes v. *The City of Halifax*..... 98

STAY OF PROCEEDINGS unless security given or assignee intervene.

See INSOLVENT ACT OF 1875, 1.

STAYING EXECUTION.

See JUDGMENT, right to enter.

TIME FOR APPEAL, reasonable.

See APPEAL FROM COUNTY COURT, 1.

PRELIMINARY PROOFS of loss by fire.

See INSURANCE, FIRE, 3.

PRESENTMENT of Bill of Exchange.

Plaintiffs brought action against defendants as endorsers of a foreign bill of exchange due February 13th, 1877. The Notary who protested the bill gave evidence that he demanded payment and protested it on the 13th. He denied that he had received it before that date, and declared that he was not at the drawee's place of business on the 12th; but the note on the bill, "February 13th," had originally been written February 12th. A protest was put in proof, dated February 13th, without the Notary's seal of office, and also a protest dated February 12th, having the seal affixed. The latter had been sent with the bill to the plaintiffs, and their attorney then corresponded with the Notary, whose explanation led him to suppose that a clerical error had been made, whereupon he enclosed to the Notary the protest of February 12th, with the draft attached, and the Notary afterwards returned the new protest amended,

dated February 13th, and the old protest of February 12th. The Notary, in his evidence, said nothing of this correspondence, and failed to explain the erasure of "12th," above referred to. Plaintiffs, on the trial before a Judge without a jury, accepted a nonsuit, with leave to move, and the Court, after argument, discharged the rule for a new trial, holding that, the evidence of the Notary being unreliable, proof of a due presentment had failed, and, further, that the protest of February 13th was defective for want of a seal.
Merchants' Bank v. *Spinney et al*..... 87

PRESENTMENT of Promissory Note.

In an action by the endorsees against the endorser of a promissory note, the defendant pleaded traversing the allegation of presentment. The messenger of the bank that held the note swore that he presented it at defendant's office, where it was payable, between 3 and 4 p m., when said office was closed. Defendant denied the presentment and denied that the office was closed, but did not deny that he had been informed of the presentment next day, and he did not deny or refer to the statement of one of the plaintiffs, that on his shewing the defendant the notice of dishonor the defendant had promised to give a good note in place of the dishonored one, or else supply goods to the amount of it. The County Court Judge set aside the plea as false, &c., on the strength of the uncontradicted evidence of this promise.

Held, on appeal, that the only question for the Court, under the pleadings, was whether the note had been actually presented, and that plaintiffs could not be said to have established the fact of presentment, as there was a contradiction.
Evans et al. v. *Foster*..... 66

PRESUMPTION arising from date of deed rebutted.

See DEED, Presumption, &c.

——————— AS TO DELIVERY OF DEED.

See ESCROW.

PRINCIPAL AND AGENT.

See AGENT.

PRIOR INSURANCE to full amount of loss.

See INSURANCE, MARINE, 3.

PRIORITY OF PAYMENTS.

See PAYMENT, Priority of.

PROCTOR, Liability of, for Registrar's fees in Probate Court.

Plaintiff, a Registrar of Probate, was requested by the defendant, a Proctor practising in the Court, to prepare copies of certain papers. Before the papers were completed plaintiff ceased to be Registrar, but was not aware of his removal from office when the order for the papers was given. The work was charged, not to the defendant, but to the estate for which he was acting. The Magistrates' Court and the County Court, on appeal, decided in favor of plaintiff.

Held, that the defendant was liable for the fees.
Bliss v. *Dickie*..... 246

PROTEST.

See PRESENTMENT OF BILL.

PROMISSORY NOTE, Acceptance of as payment.

See ACCEPTANCE OF, &c.

———————, ALTERATION IN.

Defendant, a Nova Scotian resident in Paris, gave an accommodation note bearing date "Halifax, N. S., 6th, 1875," payable to M. on demand, and enclosed it to him on the 11th June. The 6th of June being Sunday, M. on receipt of the note altered the 6 to 8, and inserted at the top the word *June*, which had been omitted.

Held that, as the liability of the maker was not increased, the note being payable on demand, and the alteration was made to correct a manifest mistake on the part of the maker, the note was good.
Merchants' Bank v. *Stirling*..... 439

———————, CONSIDERATION.

A deed of land was made by a father to one of his sons, who, at the father's request, gave his promissory notes to his father payable to the other brothers respectively, the arrangement being made for the purpose of distributing the estate of the father without a will. The notes were lodged by the father with another person.

Held, that the payees could not recover on the notes for want of consideration moving from them to the maker.
Forsyth v. *Forsyth*..... 380

———————, CONTEMPORANEOUS AGREEMENT.

The defendant and one Bushell applied to the plaintiff, a broker, to raise some money required by Bushell, who owned bank stock and had an asset due from Almon & Mackintosh, amounting in the whole to $504. Plaintiff sold the bank stock and obtained the balance of the sum required by discounting a note for $260 made by defendant to the order of Bushell, endorsed by him to plaintiff. Contemporaneously with the note a memorandum was signed by plaintiff, defendant and Bushell as follows; "A note received from F. Bossom for $260, the conditions of which are that said note is given and to be paid by the first dividend of the estate of Almon & Mackintosh, and if the first dividend does not amount to $260, the balance shall be paid on the day of maturity of said note, so that Bushell shall not be called on to pay any money whatever to protect said note, and that the amount of Bushell's account be transferred to Jenkins, and to be held by him as collateral for said note's payment, and he alone to draw said dividend and place to credit of said note for $260, and then the transfer made by Bushell to Jenkins is to be transferred to Bossom when Jenkins has received in full the sum of $504." Plaintiff retired the note and sued the defendant for the amount.

Held, reversing the decision of the County Court, that the agreement did not control the note so as to alter its character as a promissory note between the parties and prevent the plaintiff from recovering.

WEATHERBE, J., dissenting.
Jenkins v. *Bossom*..... 340

———————, DOUBLE STAMPING.

See DOUBLE STAMPING.

———————, FOREIGN LAW RESPECTING

Held, that the notes being dated at Halifax and meant to be used there, being given by one British subject to another, and having no relation to foreign transactions, the French law could not be invoked to determine the liability of the maker.
Merchants' Bank v. *Stirling*..... 439

PROMISSORY NOTE made by married woman.

See HUSBAND AND WIFE.

————————, PRESENTMENT OF.

See PRESENTMENT OF, &c.

————————, RENEWAL.

At the maturity of defendant's note to plaintiff for $263.75, the defendant gave plaintiff a renewal note for $150 and promised to pay the balance in cash next morning, which plaintiff said was all right, but on the same day the original note was sued, plaintiff still holding the renewal note, which was a negotiable instrument.

Held, reversing the decision of JOHNSTONE, J., that the plaintiff could not recover on the note sued on.

Murray v. *Gastonguay* 319

RAILWAY, *In Re* Western Counties, Costs, &c.

See COSTS of reappraisement.

———————— DAMAGES, PICTOU.

See ESTOPPEL.

RE-ARGUMENT refused.

See INSOLVENT DEBTORS, Relief of.

REASONABLE TIME for Appeal.

See APPEAL FROM COUNTY COURT, 1.

RECOGNIZANCE, Estreating.

See PRACTICE—Estreating Recognizance.

RECORD.

1. Plaintiff proposed on the trial to give in evidence a copy of a record alleged to have been filed March 13th, 1878, to meet a plea of *nul tiel record*. The Prothonotary of the Court, called by plaintiff, stated that no record of that date was to be found, and on cross-examination said the first record he had seen was filed August 18th, 1879, and that this was the first record that had been sent to him by the attorney whose duty it was to prepare it.

Held, that the Judge had properly rejected the evidence, and that he was justified in refusing to allow a record to be filed *nunc pro tunc*.

Hardy v. *Smith* 351

2. Plaintiff brought an action for use and occupation, which was afterwards amended by adding a count for mesne profits. Defendants pleaded disputing plaintiff's title and possession, and plaintiff, besides joining issue, replied setting out the fact of an ejectment suit against one Davis, the order of a Judge permitting defendants to appear *as landlords* and defend said ejectment suit, the proceedings in said suit on the 6*th May*, '75, *before* McDONALD, J., when came the said *William Jost and the said Church-wardens and Vestry*, and a jury who found, &c. On the trial the verdict in an ejectment suit was tendered and received without objection. It was signed by the Foreman and Prothonotary, and purported to be between Jost, as plaintiff, and Davis, as defendant, and did not mention the present defendants at all. A record signed by the attorney and not authenticated by an officer of the Court, was then tendered, which

recited an ejectment suit between Jost and Davis, the order of a Judge allowing the present defendants to appear and defend *in their own name*, the proceedings on *April 27th*, '75, when, "before SIR W. YOUNG, C. J., and his associate Justices, came *the parties within mentioned*," (being the plaintiff, Davis and the Church-wardens,) "and a jury, sworn," &c. The record was rejected and the plaintiff nonsuited.

Held, that the record should have been received.

WEATHERBE, J., dissenting.

Jost v. *Church-wardens, &c., of St. George's*..... 451

RECORD of Judgment.

See PRACTICE—Record.

RECORDER of City of Halifax, power to refer.

See AWARD, Setting aside.

REGISTRAR of Probate Court, recourse for fees.

See PROCTOR, Liability of, &c.

REGISTRATION, Evidence of.

In an action for breach of covenant for title contained in a deed from defendant to plaintiff, the plaintiff put in evidence a mortgage on which was endorsed what purported to be a certificate of registration. The execution of the mortgage was proved, but the certificate was not proved to have been signed by the proper officer, nor was it tendered as evidence independently of the mortgage.

Held, that as the plaintiff had had no notice of the mortgage, his title was good unless the mortgage was registered prior to the registration of the deed, and that in order to prove such registration it was necessary to shew that the certificate had been signed by the proper officer, the mere production of a paper *purporting* to be a certificate not being sufficient under Revised Statutes, chapter 79, section 18.

Gould v. *McGregor*..... 339

REJECTION OF EVIDENCE.

See RECORD.

RELATOR, in application for *mandamus*.

See DARTMOUTH, Liability of, &c.

——— IN SUITS ON CERTIORARI BONDS UNDER CAP. 75 R. S.

See PRACTICE—Default.

REMOVAL OF ASSIGNEE.

See INSOLVENT ACT OF 1875.

RENEWAL NOTE.

See PROMISSORY NOTE, Renewal.

——— OF INSURANCE POLICIES.

See INSURANCE, FIRE, 3.

RENT, Distress for.

See DEED, Presumption, &c.
See also DISTRESS for rent.

——, LIEN FOR.

See DISTRESS FOR RENT.

REPLEVIN.

Where an action of replevin was brought for goods sold by plaintiffs to defendant, and there was evidence to justify the Judge who tried the cause without a jury in coming to the conclusion that the defendant had made false representations to the plaintiffs as to his solvency, knowing them to be false, the Court refused to disturb the judgment for plaintiffs.
Hossock et al. v. *Neilly*..... 388

REPRESENTATIONS, False, as to solvency.

See REPLEVIN.

RESULTING TRUSTS.

See TRUSTS, Resulting.

RETROSPECTIVE ACT.

See INSOLVENT DEBTORS, Relief of.

RULE, Enlargement of.

See PRACTICE—Rule.

——— FOR APPEAL from County Court.

See APPEAL FROM COUNTY COURT, 1, 6, 7, 8.

——— NISI for new trial amended.

See PRACTICE—Amendment of rule.

——— NISI GRANTED AT CHAMBERS returnable in term.

See PRACTICE—Rule *nisi*.

——— NISI UNDER STATUTE set aside because bond filed instead of bail-piece.

See PRACTICE—Bail on rule *nisi*, &c.

——— TO COMPEL MAGISTRATE TO ACT.

Rule applied for under R. S., cap. 112, sec. 13, to compel a Stipendiary Magistrate to make an order for the commitment of defendant under Dominion Act of 1869, cap. 20, sec. 25, for not providing necessary food, &c., for his wife, refused on the ground that the Justice, in declining to make the order, had exercised a judicial discretion.
The Queen v. *Shortis*..... 70

SALE OF GOODS.

Plaintiff agreed to haul logs for the defendant and deliver them on the bank or brow of a river and have the same surveyed, payment to be made by the middle of May then following. He and his son swore that the logs had been delivered at the proper place and put in the position most favorable to defendant. The defence then called five witnesses to

prove that the logs were not placed in the proper position. Defendant, although contending that he was not bound to accept the logs, was about disposing of them to one Thompson, and called upon plaintiff with a view to carrying out that arrangement, but both Thompson and defendant swore that the plaintiff refused to deliver them without security. The plaintiff, although recalled, did not give any evidence to contradict this statement, but repeated his evidence as to the proper delivery in the first instance, which the Court held to be improperly received. Previous to the defendant being called he had, on cross-examination, denied having refused to deliver the logs without security, but the evidence as to this denial was regarded as unsatisfactory. There was no evidence that defendant had ever caused a survey of the logs, or that any survey made by plaintiff had ever been communicated to him. On these grounds the appeal from the judgment of the County Court in favor of plaintiff was sustained.

JAMES, J., dissenting.

Fullmore v. *Young* 556

SCHEDULE OF CREDITORS under Insolvent Act of 1875.

See INSOLVENT ACT OF 1875, 4.

SCHOOL RATE, County.

See DARTMOUTH, Liability of, &c.

SCHOOL TRUSTEES.

See TRUSTEES OF SCHOOLS.

SEAL on notarial protest.

See PRESENTMENT OF BILL.

SEAWORTHINESS, Evidence of.

See INSURANCE, MARINE, 1.

SECONDARY EVIDENCE.

See CONTRACT, Evidence of.

SECURITY for costs.

See INSOLVENT ACT OF 1875, 1.

SERVICE on agent necessary in proceeeding against foreign company.

See PRACTICE—Proceedings, &c.

SETTING ASIDE PLEA denying presentment of note.

See PRESENTMENT of promissory note.

SETTLEMENT before judgment.

See JUDGMENT, Right to enter.

SHERIFF, Action against, for escape.

See INSOLVENT DEBTORS, Relief of.

SHERIFF, Trover against.

See FRAUDULENT TRANSFER.

SHIPOWNERS, Liability of.

See BILL OF LADING.

STAMPS, Cancellation of on bill of exchange.

See BILL OF EXCHANGE, Alteration, &c.

————, DOUBLE.

See DOUBLE STAMPING.

STATUTES OF ELIZABETH.

The owner of a horse made a fraudulent bill of sale of it to his son, the defendant, for the purpose of protecting it from the claims of creditors. Defendant took delivery of the horse and afterwards sold it. Subsequently to the conveyance to the defendant, but before the said sale, the father conveyed the horse, by a bill of sale, to his daughter the plaintiff, for a debt *bona fide* due from him to said plaintiff. In an action of trover by the daughter against the son for the alleged conversion of the horse,

Held, reversing the decision of the County Court, that although the first conveyance was fraudulently made to defeat the rights of creditors, and was void as against them, under 13 Eliz., the grantor could not impart any title to the plaintiff, who could only appropriate it to the satisfaction of her claim by virtue of some legal process, and that the plaintiff could not attack the conveyance under 27 Elizabeth, as that did not apply to personal property.

YOUNG, C. J., and DESBARRES, J., dissenting.

Moore v. *Moore* 525

STAY OF PROCEEDINGS.

See INSOLVENT ACT OF 1875, 1.

See also JUDGMENT, Right to enter.

STAYING EXECUTION.

See JUDGMENT, Right to enter.

SUCCESSORS OF OVERSEERS OF POOR, Liability of.

See OVERSEERS OF POOR, 2.

SUMMARY JURISDICTION of Supreme Court taken away.

See CERTIORARI, 1, 2.

TENANTS IN COMMON under will.

See WILL, Construction of.

TRANSFER, Fraudulent.

See FRAUDULENT TRANSFER.
See also STATUTES OF ELIZABETH.

TRESPASS.

Defendant broke and entered plaintiff's premises, not being within a mile of any mine or mining works, and seized and destroyed intoxicating liquors found thereon. Plaintiff brought an action of trespass, and defendant justified under a warrant commanding him to seize all the liquors found or to be found by him on the premises. Verdict for defendant set aside.

Head v. *Putnam* 16

TROVER.

Plaintiff, in November 1876, at the request of one McKinnon, shipped by defendant's steamer certain goods, of which he took a bill of lading, requiring them to be delivered to the order of the shipper at Bayfield. At the foot of the bill of lading was a memo., stipulating that the goods were to be taken from alongside as soon as the vessel was ready to discharge, otherwise to be landed by the master, and warehoused at the expense and risk of the consignee. Plaintiff first charged the goods to McKinnon, but afterwards, on the same day, to one Thompson. On the 8th November plaintiff wrote McKinnon; "We are this day shipping your goods per 'M. A. Starr;' we have drawn upon you for $412 on account. Please protect draft." No one being present on the arrival of the steamer to take charge of the goods for the consignee, they were warehoused and, the day after, McDonald, the keeper of the warehouse,—which was the property of a company in which it did not appear that defendant had any interest,—delivered the goods to McKinnon. There was evidence of an understanding between McDonald and Randall, the defendant's agent at Bayfield, that the former was to deliver all goods unless forbidden by Randall. McKinnon dishonored the draft at maturity, and plaintiff then, for the first time, endorsed the bill of lading to Thompson, who demanded the goods from Randall, after which plaintiff brought an action of trover.

Held, that under R. S., cap. 94, secs. 164 and 166, defendant could not, under a plea denying the conversion, avail himself of the defence that the goods were not the property of the plaintiff;—that the goods had been lawfully warehoused by the defendant; that the possession of the warehousemen was not the possession of the defendant, and their failure to deliver the goods did not constitute a conversion by defendant;—further, that, even assuming that Randall had caused the goods to be delivered to the wrong party, it did not follow that defendant was liable, as Randall was merely his general agent, and had no authority from him to interfere with the goods, or direct McDonald to interfere with them after they were warehoused.

Verdict for plaintiff set aside without costs, as the view taken by the Court was not presented by defendant's counsel at the trial, and no cases in support of it were cited at the argument.

Morrison v. *Fishwick*. 59

See also DISTRESS FOR RENT.

——— AGAINST THE SHERIFF.

See FRAUDULENT TRANSFER.

TRURO, Jurisdiction of Town Court of.

See INTOXICATING LIQUORS.

TRUSTEES OF SCHOOLS, Liability on agreement.

H. L., one of three School Trustees, contracted with the other two, M. McL. and J. M., who described themselves as "Trustees of School Section No 52, S. S. Boularderie," to build a school-house, and the agreement contained the following clause; "The aforesaid M. McL. and J. M., as Trustees for the School Section, do hereby bind themselves to pay the aforesaid H. L the sum of $160," &c., &c. The agreement was signed by all three Trustees, not sealed, and the word "Trustees" was written opposite the names. H. L. having brought his action against the other two Trustees personally,

Held, reversing the decision of the County Court, that the defendants were not personally liable.

Livingstone v. *School Trustees, Boularderie*..... 535

TRUSTS, Resulting.

Plaintiff, in his bill or writ, set out that John Blair granted certain lands to defendant by deed, which, though absolute in its terms, was given to secure $600 advanced by defendant to creditors of said grantor, and that defendant, at the execution of the deed, promised to re-convey to the grantor on payment within three years of the amount due; that the estate of the grantor had become vested in plaintiff, who had tendered the $600 and offered to pay any balance found to be due defendant, who refused to accept the money or execute a deed. Defendant's answer set up a parol trust to pay in full a debt due by the grantor to defendant and apply the surplus ratably among five other creditors; that the amount thus due was more than the $600 tendered, and defendant offered to re-convey the land on payment of the debts as security for which it was given. A memorandum signed by the grantor was delivered to the defendant at the time of the conveyance, witnessing that "the sums attached to the following names," (the five creditors referred to by defendant in his answer,) "are included as the consideration money of John Blair to Robert Chambers" The creditors referred to were at the time pressing Blair for payment, and gave him time in consideration of this conveyance. The claims of several of them were bought at a reduced rate by Blair's son-in-law in Blair's interest.

Held, that there was a consideration moving from the several creditors named in the memorandum to Blair, and a resulting trust in favor of all the said creditors; that parol evidence of this trust could be given consistently with the Statute of Frands; and that defendant held the land in trust for the payment of his own debt and the debts of the other creditors at their full amount, notwithstanding the purchase of the same for a reduced sum, which was held to be a matter solely between those creditors and their assignee.

Page v. *Chambers*..... 232

VARIANCE.

See RECORD.

VERDICT, Curing defect in indictment.

See INDICTMENT.

——— SUBSISTING FRAUD.

See FRAUDULENT TRANSFER.

——— FOR PLAINTIFF in action of trespass sustained on the evidence.

See Stevens v. *Brunt*..... 492

VERDICT set aside without costs.

See COSTS.

————, SETTING ASIDE SECOND.

See INSURANCE, FIRE, 1.

———— SETTLING CAUSE OF ACCIDENT AND QUESTION OF NOTICE.

See HALIFAX STREET RAILWAY CO., &c.

———— SUSTAINED.

See WEIGHT OF EVIDENCE.

VESSELS, Assessment of, in City of Halifax.

See ASSESSMENT IN CITY OF HALIFAX.

————, CLASSIFICATION OF.

See INSURANCE, MARINE, 1.

WAIVER.

See AWARD, Setting aside.
See also CERTIORARI 2.
See also INSURANCE, FIRE, 3.

WEIGHT OF EVIDENCE.

Rule to set aside a verdict for defendants in an action tried before a Judge without a jury discharged with costs where there was a conflict of testimony on the main question on which plaintiff's right to recover depended, and no clear preponderance of evidence for the plaintiff.

Bowen v. *Troop et al* 137

See also NEGLIGENCE.
See also SALE OF GOODS.

WIFE, Liability of, on contract.

See HUSBAND AND WIFE.

WILL, Construction of.

Testator, by his last will, directed that until the expiration of four years from his decease, his executors should every year place to the credit of each of his children $1600, and if any of his children should have died, leaving issue, then a like sum "to and among" the issue of the child so dying. He then provided substantially as follows:—as regards the division, appropriation and ultimate disposition of my estate, it is my will that, subject to legacies, expenses, &c., all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof "be distributed, settled, paid and disposed of to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead," in manner following, that is, that on the expiration of four years from my death, the executors, after providing for legacies, expenses, &c., "shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue them then surviving shall amount to, and shall

apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children whose lawful issue shall be then surviving, all the issue of such deceased child standing in the place of such deceased child." And a separate account shall be kept of each share apportioned to such child or children, or wherein such issue shall be interested, "it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of twenty-one years, shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before then died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children; and that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled."

And as respects the shares of my daughters, I direct that the share of each daughter be invested, and the interest paid to her so long as she shall live, "and that on the death of my daughters, the share, claim or interest of such of them as shall have been married and shall leave children her surviving, shall be apportioned and distributed as follows, namely; ten thousand dollars, part of the share of such daughter in such manner as she shall by any instrument in writing in her hand, subscribed in the presence of one or more witnesses, direct and appoint, and the balance of such share shall be paid, apportioned and distributed to and among the children and grand-children in such proportions as she shall by any instrument in writing under her hand, subscribed in the presence of one or more witnesses, direct and appoint; and in default of any such appointment, to and among her children and grand-children in equal shares, the said grand-children standing in the place and being entitled to the share or shares of their deceased parents or parent respectively."

One of the daughters having died within two years after the death of the testator without making any will or exercising her power of appointment, and having left three sons under age, her surviving, one of whom died under age seven years after testator's death,

Held, (WEATHERBE, J, dissenting,) that the sons took as joint tenants and not as tenants in common, and that the interest of the deceased son of testator's daughter went to his surviving brothers.

Fisher v. *Anderson et al*..... 177

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